



INDEX

of

SIGNIFICANT CASES

Nos. 1 - 125

United States	Office of	October 1998	Office of	Workforce
Personnel	Relations			Management
			OWR-15	
		INTRODUCTION		

This index, which covers cases reported in *Significant Cases* Nos. 1 - 125, supersedes the January 1994 Index of *Significant Cases* Nos. 1 - 100. Like the January 1994 Index, it is made up of four parts: (1) a list of the index categories that are used, (2) the index, (3) a table of contents of cases reported in *Significant Cases*, and (4) an alphabetical listing of MSPB cases reported in *Significant Cases*.

PART 1: LIST OF INDEX CATEGORIES (p. 3)

This list, which is alphabetically arranged, gives the reader an overview of the categories used and indicates the pages in the index where the categories may be found.

PART 2: INDEX (p. 11)

This part, which is the heart of this index, contains a listing of case decisions that have appeared in reports 1 through 125 of *Significant Cases*. A single case may be reported under more than one category. A phrase or brief statement is used to describe the case. Where there is more than one case under a phrase, the cases are separated by ellipsis marks. Where appropriate, reference is made to cases that, for one reason or another, have not been reported in *Significant Cases*. Such cases are followed by (NR). Reference is also made to other publications that discuss cases and issues related to the subject-matter category.

Federal Labor Relations Authority (FLRA) decisions are identified by two numbers separated by an F. Thus 2 F 77 refers to 2 FLRA No. 77. (The bound volume page number is shown in parentheses in **PART 3: TABLE OF CONTENTS**. For example, under No. 4 one finds (603) in the listing for 2 F 77, which indicates that 2 FLRA No. 77 may be found starting on page 603 of volume 2 of FLRA's bound decisions.)

Merit System Protection Board (MSPB) decisions are given by the last name(s) of the appellant(s) involved. A more complete citation, including the MSPB docket number, may be found in **PART 3: TABLE OF CONTENTS**.

Court decisions throughout this issuance are in italics--for example, *Pearl Harbor Public Works v. FLRA* and *Yorkshire v. MSPB*. A more complete (but still abbreviated) citation, including the volume and page of the *Federal Reporter* in which the decision is reported, may be found in **PART 3: TABLE OF CONTENTS**.

The issue and page of the *Significant Cases* report in which the case is reported are given by two numbers within parentheses that are separated by a slash. Thus (96/8) refers to *Significant Cases* No. 96, page 8.

PART 3: TABLE OF CONTENTS (p. 71)

This is a listing, arranged by *Significant Cases* report number, of the cases covered in each report. For FLRA decisions, the table of contents gives the decision number, the bound volume page number, the case number, and the date of the decision. For MSPB decisions, the table of contents gives the name of the case, its MSPB docket number, and the date of the decision.

PART 4: ALPHABETICAL LISTING OF MSPB CASES (p. 107)

This part provides a quick way for readers to locate a particular MSPB or related court decision that has been reported in *Significant Cases*.

PART 1: LIST OF INDEX CATEGORIES

Abandonment of Position	11
Abeyance of Actions	11
Administrative Law Judge	11
Affirmative Action. See Discrimination--eeo	11
Agency Grievance Procedure	11
Agency Regulations	11
Agreement, Negotiated	11
Alcoholism and Drug Abuse	12
Alternative Work Schedules (Aws)	13
Appeals	13
Applicable Laws	13
Appointments	13
Appropriate Arrangements	13
Arbitration	15
Assign Employees	16
Assign Work	16
Attire and Appearance	17
Attorney Fees	18
Automation. See Methods and Means	19
Back Pay Act	19
Bargaining Unit Determinations. See Unit Determinations.	19
Beepers	19
Budget	20
Bulletin Boards	20
Burden of Proof	20
Bypass	20
Certification of Representative. See Unit Determinations	20
Charges	20
Classification. See Position Classification	21
Committees	21

Compelling Need	21
Compliance	21
Conditions of Employment	21
Conflict of Interest. See Standards of Employee Conduct	22
Contracting out	22
Contract Review. See Agreement, Negotiated	23
Corrective Action	23
Covered by Doctrine. See Midterm Bargaining	23
Crediting Plans	23
Criminal Charges	23
Debt Collection	23
Decertification of Representative	23
Denial of Within-grades	23
Details	23
Direct Employees	24
Discipline Employees	24
Discretion	24
Discrimination--eeo	25
Discrimination--§ 7102 (Protected Lmr Activities)	25
Distribution of Literature	25
Drug Testing	25
Dual Employment	26
Due Process	26
Dues--§ 7115	26
Duty of Fair Representation	26
Elections	27
Emergencies	27
Employee Questionnaires. See Bypass	27
Enforcement	27
Equipment. See Methods and Means of Performing Work	27
Estoppel	27
Evidence	27

Excepted Service Employees	28
Exceptions to Awards	28
Excessive Interference. See Appropriate Arrangements	28
Executive Order	28
<i>Ex Parte</i> Communication	28
Facilities & Services	28
False Statements	29
Falsification of Record	29
Filling Positions. See Vacancies	29
Flexitime. See Hours of Work	29
Formal Discussions	29
Free Speech	29
Freedom of Information Act. See Information	29
Furlough	30
Government Property, Misuse of	30
Governmentwide Regulation	30
Grooming Standards. Also See Attire and Appearance	30
Ground Rules	30
Handicapped Employees	30
Harmful Error	31
Hire. Also See Select and Vacancies	31
Holidays	31
Home Addresses. See Information	31
Hours of Work	32
Impact & Implementation (I&I) Bargaining	32
Impasse Proceedings	33
Incentive Pay and Performance Awards. Also See Performance	33
Individual Right of Action Appeal. See Whistleblowing	34
Information, Necessary and Relevant	34
Insubordination	35
Interim Relief	35

Interest Arbitration. See Impasse Proceedings	35
Internal Security Practices	35
Internal Union Business	36
Investigations	36
Judicial Review	36
Jurisdiction	36
<i>Laches</i>	38
Last Chance Agreements. Also See Settlement Agreement	38
Layoff	38
Leave	38
Lunch and Break Periods	40
Management Official. See Unit Determinations	40
Management Rights	40
Mediation. See Impasse Proceedings	41
Medical Issues	41
Merger Doctrine	41
Methods and Means	41
Midterm Bargaining. Also See I&i Bargaining	42
Mitigation/penalty	42
Mixed Cases	43
Moonlighting. See Dual Employment	43
Mspb Procedures	43
National Partnership Council. Also See Partnerships	43
Negotiability	43
Negotiated Grievance Procedure. Also See Arbitration	44
Nexus	45
Notice Period	45
Numbers, Types, and Grades of Employees or Positions. See Staffing Patterns	46
Off-duty Misconduct. See Nexus	46
Official Time	46
Organization of Agency	46

Organizing Employees	46
Overtime	46
Partnerships	47
Past Practices	47
Pay, Fringes, and Pay Administration	47
Performance	48
Permissive Subjects	51
Personnel by Which Operations Are Conducted	51
Physical Working Conditions	51
Picketing	51
Position Classification	51
Position Description	52
Prehearing Discovery	52
Privacy. See Information	52
Probationary Employees	52
Procedures, Negotiable--§ 7106(b)(2))	52
Prohibited Personnel Practices	52
Promotions	53
Protective Order	53
Qualification Requirements	53
Reasonable Accommodation	53
Reassignment	55
Reduction in Force	55
Reduction in Hours	56
Reemployment Rights	56
Rehabilitation	56
Remedies	56
Remove Employees. See Discipline Employees	57
Reorganization. See Organization and Reduction in Force	57
Representation	57
Representation Proceedings	57

Resignation	57
Restoration Rights	57
Retaliation	57
Retirement	58
Safety & Health	58

Scope of Bargaining. See Condition of Employment, Governmentwide Regulation, Compelling Need, Management Rights, and Mgb No. 36	58
Seasonal Employees	58
Section 704 Employees	58
Security Clearances	59
Selections for Appointments	59
Seniority	59
Separations	60
Ses Appointees	60
Settlement Agreement	60
Sexual Harassment	61
Shift Assignments	61
Shutdown. See Leave and Compelling Need	61
Sovereign Immunity. See Remedies	61
Special Counsel	61
Staffing Patterns	61
Standards of Employee Conduct	62
Standards of Union Conduct	62
Standby	62
Statements	62
Stays of Personnel Actions	62
Strikes, Slowdowns, Job Actions	63
Suitability	63
Supervisors	63
Suspensions	63
Taper Employees	64
Technology. See Methods and Means	64
Temporary Employees	64
Theft	64
Threats	64
Timeliness	64
Training	65

Transfers	65
Travel & per Diem	65
Unfair Labor Practices	65
Uniforms. See Attire	66
Unit Consolidations. See Unit Determinations	66
Unit Determinations	66
Unit Eligibility Determinations. See Unit Determinations	66
Upward Mobility	66
Vacancies	67
Voluntariness of Action	67
Waiver	67
<i>Weingarten</i> Rights	68
Whistleblowing	68
Within-grade Denials	69
Workers Compensation	69
Work Release Program	69
Work Schedules	69

PART 2: INDEX OF SIGNIFICANT CASES

ABANDONMENT OF POSITION

Missing Employee Act: Fugate (36/14)

ABEYANCE OF ACTIONS

Action held in abeyance and reinstituted: Rhodes (48/28)

ADMINISTRATIVE LAW JUDGE

High rate of significant adjudicatory error as basis for discipline: Anyel (99/33)

Retired employee disqualified for appointment as ALJ: Vesser (99/34)

Constructive removal of ALJs: *Sannier, Youngblood, & King v. MSPB* (86/3)

Actions against ALJ: Rowell (84/25)

OPM's ALJ exam doesn't violate employment practices: *Curtin v. OPM* (76/20)

Attorney fee awards: Balaban (50/30)

When to use RIF or adverse action procedures: Clerman, Dolan, Doswell (70/35)

Dismissal for "good cause": *Brennan v. HHS* (56/8)

AFFIRMATIVE ACTION See DISCRIMINATION--EEO.

AGENCY GRIEVANCE PROCEDURE (AGP)

Reprisal for filing grievance isn't ground for IRA: Fisher (85/15)

Unit employees using AGP to grieve matters not covered by NGP: 23 F 68 (60/20)

Access to AGP is negotiable. 25 F 73 (NR)

AGENCY REGULATIONS. See also COMPELLING NEED and MGB No. 16 (pp. 32 - 36).

Effect of midcontract changes in agency regulations on RIF rights where the CBA provides that the parties are governed by "subsequently published agency regulations and policies": 52 F 128 (118/15)

Consultation at the national level doesn't relieve subordinate activities of their duty to give notice and bargain: 50 F 38 (106/14)

Action at odds with agency regulations (but in accord with law and governmentwide regulations) is proper: Romero (95/28)

Agency regulations as a basis for setting aside an arbitration award: 37 F 12 (82/29)

Notifying unions of new or modified agency regulations: 12 F 86 (32/5)

AGREEMENT, NEGOTIATED

An agreement resulting from negotiations conducted in a "partnership" atmosphere may nonetheless be a statutorily enforceable collective bargaining agreement: 53 F 42 (120/12)

Arbitrator interprets a partnership agreement as not creating an enforceable bargaining obligation: 52 F 118 (120/15)

Effect of midcontract changes in agency regulations on RIF rights where the CBA provides that the parties are governed by "subsequently published agency regulations and policies": 52 F 128 (118/15)

A provision on a permissive subject does not automatically terminate upon expiration of the agreement, but rather only when a party notifies the other that it will no longer be bound by the provision: 51 F 125 (114/13)

6 of 7 provisions imposed by interest arbitrator are nonnegotiable: 51 F 108 (113/8)

Interest arbitrator without authority to impose new proposals not bargained to impasse: *Commerce v. FLRA* (103/4)

Contractual definitions that differ from those in Governmentwide regulations are nonnegotiable: *Commerce v. FLRA* (103/4)

§ 7119(b)(1) doesn't encompass voluntary interest arbitration: 41 F 72 (86/13 & 87/14)

§ 7114(c) doesn't apply to voluntary interest arbitration: 41 F 1 (86/11)

Governmentwide regulations issued during term of the agreement become controlling when the agreement renews itself: 37 F 104 (82/24). But see 40 F 57 (85/5).

§ 7114(c) review of interest arbitration provisions: 27 F 72 (66/15), reversed in *DODDS v. FLRA* (73/10) ... FLRA retreats in 37 F 111 (82/21)

Agency disapproval of a carryover provision is a change in COE that can be challenged under ULP procedures: *Montana Association of Civilian Technicians v. FLRA* (80/5)
 FSIP orders adoption of nonratified agreement: 89 FSIP 132 (79/11)
 Midterm bargaining zipper clauses: 31 F 109 & 111 (71/19)
 § 7114(c) doesn't apply to agreed-upon permissive subjects: 24 F 7 (61/7)
 § 7114(c) review applies to FSIP-ordered provisions: 15 F 120 (40/3), aff'd *AFGE v. FLRA* (53/13)
 § 7114(c) disapproval needn't be specific: 20 F 65 (51/24), aff'd *NAGE R4-68 v. FLRA*, No. 85-2282 (4th Cir. Sept. 4, 1986) (NR)
 Execution date may not be the effective date: 19 F 118 (50/11)
 Incorporating Governmentwide RIF regulations into the contract: 19 F 24 (50/22)
 Official time to negotiate local supplemental agreement: *AFGE v. FLRA* (44/3)
 Terminating permissive subjects covered by expired contract: 14 F 89 & 15 F 21 (37/3)
 Terminating mandatory and prohibited subjects covered by expired contract: 4 F 100 (13/3)
 Duration of agreement: 80 FSIP 38 (13/7)

ALCOHOLISM AND DRUG ABUSE. Also see **DRUG TESTING** and **REASONABLE ACCOMMODATION.**

Misconduct involving driving under the influence while on-duty constitutes disqualifying behavior that precludes any right to reasonable accommodation: Coates (119/17)
 Current illegal users of drugs are no longer covered by the Rehabilitation Act : Little, Lazenby (107/28)
 A period of relapse does not negate the entitlement to back pay for the entire period of removal. Hulsey (102/26)
 Status quo ante remedy for bargaining ULP not appropriate for FAA employees: 48 F 29 (101/10)
 Last chance agreement as reasonable accommodation: *Golson-El v. Runyon* (97/10)
 Firm choice: Harris ... Banks (97/19)
 Employee, despite drug addiction, not a qualified handicapped person because of criminal misconduct: *Taub v. Frank* (92/7)
 Failing to connect doing alcohol/drugs with submitting false medical certifications: Rivers (92/20)
 No duty to accommodate employee's alcoholism due to disqualifying misconduct: Scofield (91/31)
 Agency must prod employee into treatment: *Gallaher v. Catto* (90/14)
 Arbitrator can't waive employee's due process rights: Coleman (89/26)
 Leniency not a reasonable accommodation absent firm choice: Reilly, Vaughn (88/37)
 Immunity: Savage (86/18)
 Employee's use of alcohol on the job: Gleim (85/16)
 Backpay if placed in nonduty, nonpay status after rehabilitation: Holly (85/27)
 "Qualified" handicapped employees: Wilber (83/19)
 "Firm choice" between treatment and removal: Calton (82/48)
 Removal while employee is undergoing rehabilitation: Faber (77/34)
 Reasonable suspicion of alcohol or drug abuse: Terry (76/24)
 Allowing employees a chance at rehabilitation: Hodge (75/21)
 Extent of substance abuse as handicapping condition: McCaffrey, Brinkley, Campbell, Toone, Loveland, Beverly, Hougens (74/33)
 Evidence of drug abuse/addiction at the time misconduct occurred: McCaffrey (72/28) ... Brinkley (74/33)
 Off-duty drug use and nexus: Kruger, Lake & Pollock (62/29) ... Hebron (72/22)
 Drug use, agency mission, and on-duty misconduct: Facer (65/20)
 Agency obligation to accommodate: McGilberry, Haskins (39/24) ... Kulling (56/31)
 Proof of handicap: Robertson (56/29)
 Qualified handicapped employee and safety considerations: Kulling (56/31)
 Eligibility for disability retirement: Winslett (55/21)
 Progressive discipline after rehabilitative efforts: Gwynn (54/22)
 Failure to successfully rehabilitate: Burchell (52/21)
 No knowledge of handicap: Ferguson (52/23)
 Reinstitution of action: Rhodes (48/28)
 Handicap raised in response to proposal: Noe (48/26)
 Action held in abeyance: Walton (45/7) ... Rhodes (48/28) ... Ferby and Jackson (45/14)
 Status while in rehabilitation: Rison (43/23)

Unrelated to job: Clemons and Nichols (43/23) ... Peru (29/22)
 OTJ intoxication in nonsensitive and sensitive positions: Cavallaro (38/24) ... Peru (29/22)
 Participation in rehabilitation program gives no immunity to discipline: 6 F 98 (19/15)
 Qualifications of alcohol and drug abuse counselors not negotiable: 3 F 28 (7/5)

ALTERNATIVE WORK SCHEDULES (AWS). See **HOURS OF WORK.**

APPEALS. Also see **JURISDICTION** and **WHISTLEBLOWING**

Consequential damages in an IRA case: O'Regan (122/20)
 There is no election of forum when appeal to MSPB is dismissed as untimely filed. Brundin (121/21)
 No right to appeal an alleged improper restoration where full recovery from compensable injury takes more than a year from eligibility for compensation: Welter (119/18)
 Appealing, after retiring before the effective date, a final decision to remove: Robinson (118/24)
 Showing that a waiver of appeal rights was involuntary: Clede (118/25)
 Bifurcation of charges in ch. 75 appeals generally not appropriate: Stein-Verbit (116/17)
 Dividing line between non-appealable actions in lieu of RIF and actions, voluntary or otherwise, which confer RIF appeal rights: Smitka (107/24)
 IRA appeal found to be moot: Occhipinti (104/37)
 A reduction-in-force may be a personnel action covered by the Whistleblower Protection Act : Carter (104/30)
 MSPB has no jurisdiction to hear RIF appeal of non-preference eligible employee: Marcoux (104/15)
 Simultaneous filing of NGP grievance and IRA appeal: Laity (103/29)
 EEO appeal rights: Royal (83/17)
 Proper respondent during appeals from MSPB decisions: *Hagmeyer v. Treasury* (76/17)
 Appealable suspensions: *Pittman v. MSPB* (69/11) MSPB (69/11)
 Not appealable suspension: Pittman (64/26)
 Retirement appeals: Simmons (62/32)
 Filing of criminal complaint is not an exercise of appeal right: Ledeaux (54/25)
 Untimely appeal: McKeithan (43/32)

APPLICABLE LAWS within meaning of section 7106(a)(2)

Two-prong test applicable to performance rating grievances limited to "applicable laws" and agreement provisions on a § 7106(b) matter (i.e., on the exceptions to management's § 7106(a) rights): 53 F 21 (119/6)
 Contracting-out remedial powers of arbitrators expanded for violations of "applicable laws": 43 F 64 (89/19)
 § 7106(a)(2) "applicable laws" include regulations having force and effect of law : 42 F 31, 42 F 92 (88/9)
 Supreme Court on "applicable laws": *Treasury v. FLRA* (81/8)

APPOINTMENTS

Reemployed annuitants that serve at the will of the appointing office: *Vesser v OPM*; *Ochoa v Navy*. (106/12)
 Improper Ramspeck appointment: Bickmore (103/30)
 Removal of temporary employee based on performance: Meade (80/26)
 Illegal VRA appointment: *Jakes v. VA* (59/9) ... *Collaso v. MSPB* (52/5)

APPROPRIATE ARRANGEMENTS--§ 7106(b)(3). Also see MGB No. 33.

Abrogation test for arbitration awards

Abrogation test applied to "negotiated" agency directive: 45 F 107 (93/25)
 FLRA replaces E-I balancing test with an abrogation test for arbitration awards interpreting agreement "arrangements": 37 F 20 (overtime assignment limitations), 37 F 47 (training for detailed employees), 37 F 67 (selecting employee with priority consideration), 37 F 70 (medical diagnosis not part of medical certificate), 37 F 103 (productivity and overtime assignment), and 37 F 106 (mandating approval of A/L requests); 38 F 3 (tardy employees not being charged AWOL), 38 F 11 (barring painting of station's exterior), and 38 F 21 (D-action deadline): (82/15)

Negotiability cases. Also see **MGB No. 33**, (9/87).

Insufficiently tailored light duty proposal for temporarily disabled employees: 53 F 131 (123/12)
 Non-tailored prophylactic proposals intended to eliminate the possibility of an adverse effect where it is impossible to predict which employees would be adversely affected are § 7106(b)(3) arrangements: 53 F 59 (121/9)
 Proposal restricting work assignments to the bargaining unit interferes with the right to assign work and, because there was no showing that loss of opportunity for overtime is an adverse effect, isn't an appropriate arrangement: 53 F 22 (119/9)
 A proposal blocking a 25% increase in the productivity standard doesn't qualify as an appropriate arrangement where the record isn't sufficient to establish an adverse effect: 52 F 48 (115/5)
 Requiring agency to place employee, whose tour is involuntarily extended, in one of three positions excessively interferes with rights to assign employees and to select: 51 F 108, #6 (113/8)
 Requirement that all tour extension and home leave decisions be consistent with regulations isn't sufficiently tailored to qualify as a (b)(3) arrangement: 51 F 108, #1 (113/8)
 Provision establishing a 2-year initial tour of duty isn't sufficiently tailored: 51 F 108, #3 (113/8)
 Limitations on agency's ability to adjust the duration of an assignment excessively interferes with the right to assign work: 51 F 108, #4 (113/8) ... Compare with 31 F 8 (NR)
 Solitary work proposal excessively interferes with right to assign work: 49 F 38 (102/17)
 Wearing body armor over uniform shirt a negotiable appropriate arrangement: *INS v. FLRA*, (101/8)
 Food & drink in computer rooms: *NTEU v. FLRA* (100/3)
 "Untailored" appraisal process doesn't qualify as an appropriate arrangement: *NLRB v. FLRA* (99/5)
 Requiring that ratings take account of all job functions and available time: 46 F 66 (97/16)
 Making TQM team assignments voluntary not an appropriate arrangement: 46 F 56 (95/12)
 DC Cir. says that appropriate arrangements must be tailored to benefit only those employees suffering adverse effects: *Interior v. FLRA* (92/3) ... cited by 5th Cir. in finding a proposal delaying interrogations involving shooting incidents not to be an appropriate arrangement: *INS v. FLRA* (94/5)
 Denial of proposed benefit isn't an adverse effect: *IRS v. FLRA* (91/10) ... adopted by FLRA in 45 F 126 (93/22)
 Various appropriate arrangement determinations involving excusal from work: 45 F 30 (92/10)
 2nd Cir. sanctions use of excessive interference test: *OEA v. FLRA* (91/12)
 NGP enforcement of some regulations abridging § 7106 rights are negotiable: 42 F 34 (88/12)
 "Objective" qual standards for selections for details is negotiable: 41 F 88 (87/19)
 Paid cleanup time: assigning employees the work of cleaning up doesn't excessively interfere with the right to assign work: 40 F 38, #3 (85/7) ... 40 F 60, #2 (85/11)
 Equitable work distribution and using employee skills to maximum extent: 40 F 60, #8 (85/11). Cf. 32 F 24 re "MUST" proposal (MGB No. 36, p. 16)
 Paraphrased regulations pass E-I test: 40 F 60, #6 (85/11)
 Limiting overtime to 8-hr blocks on Saturdays is an appropriate arrangement: 40 F 60, #4 (85/11)
 Training: 22 F 92 (59/19) ... 23 F 36 (59/16). But see 39 F 45 (84/7) on narrowing of training notion.
 Although laws and regulations interfere with the internal security right, the interference isn't excessive: 38 F 89 (83/6)
 E-I and Governmentwide regulations: 29 F 40 (68/12), aff'd in *OPM v. FLRA* (75/7) ... 38 F 89 (83/6)
 Interest arbitration & excessive interference test: 28 F 114 (67/11). Cf. grievance arbitration & abrogation test: 37 20 (82/15)
 Light duty assignments dictated by non-agency medical authorities: 36 F 81 (82/30)
 Hiring freeze: 20 F 85 (52/18) ... Nationwide freeze excessively interferes with § 7106 rights: *NRC v. FLRA* (80/11)
 Bump & retreat rights for excepted service employees: *NRC v. FLRA* (80/11)
 Changes in job requirements: *OEA v. FLRA* (77/13)
 Arbitrator applying E-I test to contract provisions: 32 F 42 (72/20). But see **Abrogation test for arbitration awards**, above.
 Continuous v. discontinuous furloughs: 22 F 29 (59/21), aff'd in *OPM v. FLRA* (68/3)
 Remedies for unsatisfactory performance: *AFGE 1923 v. FLRA* (65/5)
 Filling vacancies with RIF-affected employees: 20 F 85 (52/18) ... 21 F 4 (54/11)
 FLRA adopts excessive interference test: 21 F 4 (54/11)
 "Progressive" discipline & unsatisfactory performance: 18 F 42 (47/25)
 A 7106(b)(3) appropriate arrangement may limit a § 7106 management right: *AFGE v. FLRA* (31/5) ... *AFGE 32 v. OPM* (35/4) ... 7 F 13 on remand (37/11) ... *Assoc. of Civilian Technicians v. FLRA* (45/3)
 D.C. Cir. articulates excessive interference test: *AFGE v. FLRA* (31/5)

§ 7106(b)(3) cases before "excessive interference" and "abrogation" tests

Retraining program for employees adversely affected by RIF: 8 F 35 (25/4)

"Reasonable effort" to assign work to qualified unit employees: 6 F 106 (20/11)

Removing names from telephone directories and nameplate formats: 2 F 30 (2/15)

ARBITRATION--§§ 7121 & 7122. See **IMPASSE PROCEEDINGS** for interest arbitration cases. Also see MGB Nos. 3, 19, 24, 26, 28, 29, 38.

An arbitral remedy that interferes with the right to select cannot be sustained where the violated CBA provision does not deal with a § 7106(b) matter: 54 F 7 (124/16)

Arbitrators must apply the remedies of the FLSA for FLSA violations: 53 F 134 (123/10)

FLRA will remand where awards don't contain the factual findings needed to determine whether the arbitrator's legal conclusions are consistent with the applicable standard of law: 53 F 152 (123/5)

Two-prong test applicable to performance rating grievances limited to "applicable laws" and agreement provisions on a § 7106(b) matter: 53 F 21 (119/6)

An arbitrability award not drawing its essence from the agreement, which specifically excluded grievances over the filling of supervisory positions from the NGP, is set aside. 53 F 7 (119/5)

The 9th Circuit says it lacks jurisdiction to review a FLRA decision on exceptions to an arbitration award where the award does not involve a ULP: *NTEU v. FLRA* (118/4)

Although arbitrators normally aren't bound by another arbitrator's award, an arbitrator has discretion to decide that an earlier award is binding: 51 F 130 (114/12)

D.C. Circuit says that alleged violations of A-76 can't be arbitrated. *IRS v. FLRA*; *Justice v. FLRA*; *Public Debt v. FLRA*. (98/3)

Leedom v. Kyne appeal of Authority AR decisions: *Prisons v. FLRA* (95/3). Also see *Interior v. FLRA*, No. 92-9503 (10th Cir. 7/27/93) (NR)

Contractual limitation on arbitrator's jurisdiction not a noncompliance ULP defense: *SSA v. FLRA* (93/4)

Election of forum: § 7116(d): *AFGE Local 1411 v. FLRA* (91/16) ... *Commerce v. FLRA* (93/7)

Contracting-out remedial powers of arbitrators expanded for violations of "applicable laws": 43 F 64 (89/19)

Prehearing discovery provisions are negotiable: 41 F 72, # 9 (87/14)

Back Pay Act & implicit causation standard: 41 F 50 (86/5)

Judicial review when ULP is implicated in AR decision: *OEA v. FLRA* and *NTEU v. FLRA* (66/3) ... 41 F 21 (86/21)

MSPB applies collateral estoppel to an arbitration award: *Gamble* (86/32)

Appropriate arrangements and abrogation test: 37 F 20, 47, 67, 70, 103, and 106; 38 F 3, 11, and 31 (82/15)

Abrogation test doesn't apply to permissive subjects: 37 F 67 (82/15)

Agency regulations as a basis for setting aside an arbitration award: 37 F 12 (82/29)

Grieving violations of OMB Circular: *HHS v. FLRA* (71/5). But see Supreme Court in *Treasury v. FLRA* (81/8)

Infractions committed while acting supervisor: *Devine v. Levin* (39/6), apparently reversed by *Hess v. IRS* (79/3), holding that unit status when aggrieved is controlling.

Misapplication of U.S. Constitution: *Devine v. Goodstein* (26/10) ... 33 F 2 (74/25)

Attorney fee requirements: 21 F 25 (55/9)

Requesting attorney fees after award becomes final: 32 F 63 (72/15)

FLRA can consider jurisdiction of arbitrator in noncompliance ULP proceedings: *AFGE v. FLRA* (72/3)

Reopening an award that's become final: 32 F 62 (72/17)

Applying excessive interference test when interpreting agreement provisions: 32 F 42 (72/20). But see 37 F 20 (82/15)

No arbitral review of performance-based actions against nonpreference excepted service employees: *HHS v. FLRA* (74/7). But law changed: See 104 Stat. 461, cited in 39 F 5, ## 16 & 17.

Unit status of grievant can't be decided by arbitrator: 32 F 125 (73/21)

Arbitrator can review hearing officer's debt determination: 32 F 105 (73/22)

Reopening award because no record on whether grievant was disciplined for engaging in protected activity: 32 F 40 (72/21)

Constitutional challenges to awards will be reviewed by courts: *Griffith v. FLRA* (71/9)

Arbitral review of performance standards, ratings, and actions: 21 F 86 (57/19) ... *Rogers v. DODDS* (65/3) ... 30 F 76 (69/14) ... 30 F 127 (70/28)

Arbitrator's jurisdiction for life of contract: 29 F 125 (69/18)

Choice of forum: *Morales v. MSPB* (67/7)

Arbitrators can't mitigate Chap. 43 actions: *Horner v. Bell* (66/6)

EEOC review of awards in mixed cases: *Marens v. HHS* (66/13)

Illegal award not enforced by FLRA: 27 F 91 (66/22)

FLRA won't review arbitrability in § 7512 cases: 23 F 102 (62/27)

Remedies for contracting-out violations: 22 F 72; 23 F 22, 23, 26 (58/18). But see *IRS v. FLRA*; *Justice v. FLRA*; *Public Debt v. FLRA*. (98/3)

Arbitrability: 2 F 32 (3/7) ... 23 F 102 (62/27)
 FLRA enforcement of adverse action awards: 22 F 20 (57/13)
 No judicial review of non-adverse action awards enforced by FLRA: *Air Force v. FLRA* (51/3) ... *Marshals Service v. FLRA* (53/9). But see *Navy v. FLRA* (64/4) where court reviewed because FLRA misconstrued the award.
 Stays of awards: rulemaking v. adjudication: *AFGE 3090 v. FLRA* (52/3)
 Harmful error to union: *Devine v. Nutt* (30/3), reversed by Supreme Court in *Cornelius v. Nutt* (47/3)
 Unions have no standing to seek judicial review of adverse action awards: *AFGE v. Justice* (39/7)
 Statutory standards in reviewing adverse actions: *Devine v. Pastore* (36/13)
 Applying harmful error standard of review: *Devine v. Brisco* (36/11)
 Deadlines for exceptions: Civil Service Miscellaneous Amendments Act of 1983 (35/3)
 Alternative "harmful error" doctrine: *Devine v. White* (30/3). But see *Cornelius v. Nutt* (47/3)
 Prohibited classification/inaccurate position description: 8 F 103 (26/14)
 ULP to not participate in arbitration proceedings--7 F 23 (21/7), reversed by 10 F 60 (29/9)--and to not cooperate in the selection of the arbitrator: 39 F 42 (NR)
Ex parte arbitration proceedings: 7 F 23 (21/7) ... 26 F 9 (NR)
 Witnesses aren't § 7114 "data": 7 F 23 (21/7)
 OPM challenge of award involving § 7512 action: *Devine v. Goodstein* (20/14)
 Award directing no action can't violate § 7106: 7 F 1 (20/16)
 Bench decisions: 80 FSIP 38 (13/7) ... 26 F 9 (NR)
 Costs of arbitration: 80 FSIP 38 (13/7)
 Uncontested award isn't a FLRA order: 2 F 101 (5/5)
 Binding arbitration mandated by statute: 2 F 32 (3/7)
 Findings necessary for an award of back pay: 32 F 162, 2nd par. on p. 1226 (NR)

ASSIGN EMPLOYEES--§ 7106(a)(2)(A). Also see **VACANCIES** and **DETAILS** and MGB No. 20 (pp. xv - xx) and MGB No. 36 (pp. 19-20).

Requiring agency to place employee, whose tour is involuntarily extended, in one of three positions excessively interferes with rights to assign employees and to select: 51 F 108, #6 (113/8)
 Using seniority to select among equally-qualified employees for position A (otherwise negotiable) interferes with right to assign employees to position not-A: 48 F 47 (99/17)
 Seniority-based assignment procedures: 2 F 77 (4/5), aff'd in *DOD v. FLRA* (18/3) ... 3 F 44 (7/9) ... 7 F 45 (22/5) ... 20 F 105 (53/20) ... *AFGE 1336 v. FLRA* (affirming 21 F 92) (70/15). Cf. 35 F 127 (81/16)
 Rehabilitation Act's reasonable accommodation requirements override management's right to assign employees: 24 F 19 (61/5)
 Duration of details and detail rosters: 7 F 45 (22/5)
 "Loan" assignment selection criteria: 7 F 45 (22/5)
 Duty station assignment selection criteria: 6 F 97 (19/11)
 Rotation through duties of position and/or other positions. 3 F 7 (6/3). Cf. 25 F 61 (NR)
 Repromoting FES-downgraded employees on basis of seniority: 3 F 26 (6/15)
 RIF reassignment rights, deferral to employee choice: 2 F 77 (4/5)
 TDY assignment selection criteria: 5 F 15 (14/3). See also 25 F 9, #4 (NR).

ASSIGN WORK--§ 7106(a)(2)(B). Also see **PERFORMANCE** for cases involving combined rights to "direct employees" and "assign work." Also see **APPROPRIATE ARRANGEMENTS**, cases on "excessive interference" and "abrogation" tests. Also see MGB No. 20 (pp. ii - xiv) and MGB No. 36 (pp. 23 - 24).

Proposal restricting work assignments to the bargaining unit interferes with the right to assign work and, because there was no showing that loss of opportunity for overtime is an adverse effect, isn't an appropriate arrangement: 53 F 22 (119/9)
 Limitations on agency's ability to adjust the duration of an assignment excessively interferes with the right to assign work: 51 F 108, #4 (113/8)
 Provision establishing a 2-year initial tour of duty isn't sufficiently tailored: 51 F 108, #3 (113/8)
 Paid cleanup time: assigning employees the work of cleaning up doesn't excessively interfere with the right to assign work: 40 F 38 (85/7) ... 40 F 60 (85/11)

Grievance adjustment meetings and "options": 40 F 38, #1 (85/7)
 Equitable work distribution and using employee skills to maximum extent: 40 F 60, #8 (85/11). Cf. 32 F 24 (MGB No. 36, p. 16).

Use of beepers: 39 F 67 (84/5)
 Duty-time instruction unrelated to job (e.g., information on drug testing program) isn't covered by right to assign work. 39 F 45 (84/7)
 Changes in work assignments, I&I bargaining, and *status quo ante* remedies: 8 F 111 (26/12) ... 8 F 112 (26/13) ... *NTEU v. FLRA* (82/7). **But see** 37 F 19 (NR).
 Abrogation test passed by a provision which, as interpreted by the arbitrator, bars assignment of painting duties to firefighters: 38 F 11 (82/15)
 No abrogation by requirement to train when assigning different duties: 37 F 47 (82/15)
 Training: its type, frequency, duration, location, scheduling: 3 F 66 (9/1) ... 6 F 106 (20/11) ... 8 F 35 (25/4) ... 22 F 92 (59/19) ... MGB No. 20, § E ... MGB No. 33, § III-B (E-I test) ... 37 F 47 (abrogation test) (82/16).
 See 39 F 45 (84/7) on narrowing the training notion.
 Award improperly assigns MOD duties: 11 F 43 (30/9). Cf. 38 F 11 (82/18)
 Restrictions imposed by non-agency medical authorities on the assignment of work are appropriate arrangements: 36 F 81 (82/30)
 Duration of work station rotation cycle: *INS v. FLRA* (69/8)
 Right to assign work includes right to reduce hours: 30 F 1 (69/17)
 Sunday work selection procedures for the equally qualified: 26 F 63 (65/11)
 Daylight savings time & additional work: *Navy v. FLRA* (64/3)
 Medical information disclosure: 26 F 34 (64/17)
 Taking account of selected employee's availability: *NTEU v. FLRA* (63/6)
 Union preference & office audits work: *NTEU v. FLRA* (63/6)
 Rehabilitation Act's reasonable accommodation requirements override right to assign work: 24 F 19 (61/5)
 Establishing store hours: 16 F 144 (44/11). See esp. 22 F 92 (59/19).
 30-day rotation of temporary promotions: 19 F 81 (50/20)
 Assigning work unrelated to classification or P.D.: 7 F 1 (20/16) ... 19 F 81 (50/20)
 Mandatory approval of leave requests: 19 F 6 (48/10). But see 37 F 106 (82/18) re abrogation test and 40 F 60, #6 (85/11) and 41 F 60 (87/17) re sick leave.
 Barring assignment of work requiring different skills: 17 F 45 (46/22)
 Accuracy of P.S.: 2 F 16 (2/7) ... 6 F 97 (19/11) ... 8 F 75 (25/8)
 Seniority procedures in assigning work: 2 F 77 (4/5) ... 9 F 84 (NR) ... MGB No. 20
 Scheduling tasks: 22 F 92 (59/19)
 Duration of work assignments: 2 F 77 (4/5) ... 19 F 81 (50/20)
 Amounts of time set aside for specific tasks: 19 F 99 (49/13)
 Assigning overtime to unit employees only: 16 F 54 (42/6)
 Distribution of incentive pay opportunities: 14 F 77 (39/14)
 Retaining flexitime while in training during duty hours: 9 F 142 (29/1)
 Employee silence/duty to account: *Pearl Harbor Public Works v. FLRA* (25/2)
 Limiting nonvoluntary travel to 35 days: 8 F 75 (25/8)
 Union selection of wage survey data collectors: 7 F 52 (22/8)
 Specifying which employees must perform certain duties: 3 F 117 (9/7) ... 6 F 97 (19/11) ... 6 F 98 (19/15) ... 7 F 35 (22/3) ... 9 F 142 (29/1) ... 19 F 99 (49/3) ... MGB No. 20, pp. ix & xx
 Sheltered work: 6 F 105 (20/7). But see MGB No. 33 (E-I test).
 Assigning work to qualified employees only: 6 F 106 (20/11). But see MGB No. 33 (E-I test).
 Assigning unit work to nonunit employees: 6 F 106 (20/11)
 Retaining selected cases when workload is unmanageable: 6 F 97 (19/11)
 Accepting work from other sections: 3 F 117 (9/7)
 Weapons qualifications tests & practice opportunities: 4 F 52 (9/13)
 Assignment of supervisory duties: 2 F 98 (5/3)
 Job redesign procedures: 2 F 77 (4/5)
 Assigning EEO counseling duties to union nominees: 2 F 77 (4/5)

ATTIRE AND APPEARANCE

Union buttons and uniforms: *INS v. FLRA* (90/3)
 Prison guards' uniforms related to agency's mission: *AFGE v. FLRA* (75/6)
 Beards: 31 F 94, # 6 (71/24)
 Grooming standards: 8 F 85 (25/8) ... 26 F 62 (NR) ... MGB No. 36, p. 30
 Uniforms: MGB No. 36, p. 30

ATTORNEY FEES-- 5 U.S.C. § 5596

When an award of fees for paralegal services is appropriate: 53 F 148 (123/9) FLRA will no longer vacate,

without further proceedings, deficient attorney fee awards: 53 F 150 (123/7)

Since grievants prevailed, they incurred the higher of the two rates offered by the law firm: 53 F 150 (123/7)

MSPB must only determine whether an appellant has set forth a *prima facie* case of jurisdiction in order to grant a motion for attorney fees: Joyce (119/16)

An agency is liable only for those attorney fees which it causes to be incurred by unjustifiably prolonging a proceeding: Short (115/15)

Conditions for awarding attorney fees in a retirement appeals case: Stewart (114/14)

Relevant market rate is market in which hearing is held unless . . . 51 F 17 (109/6)

Attorney fees in enforcement proceedings: agency bears burden of proof. Wahley (103/26)

Relief granted an appellant must be causally related to the initiation of an MSPB appeal: Quintanilla (102/37)

Costs directly incurred by a prevailing appellant on a WPA claim can be recovered: Bonggat (101/35)

"Fees for fees" available under BPA and payable by employing agency: *AFGE 3882 v. FLRA* (97/5)

A-fees may include services of law students: Anderson (95/22)

Prevailing party: *Hamel v. PCEE* (97/7)

No enhancements under fee-shifting statutes: *Burlington v. Dague* (93/20)

MSPB uses local rate for out-of-state attorney: Koenig 93/28)

Non-attorney consultants not entitled to A-fees: Fishback (93/33)

FLRA set aside A-fee denials because no reasoned explanations: 44 F 108 & 121 (92/15)

No A-fees on demotion replaced by removal because employee didn't prevail on the demotion: Roth (92/16)

No A-fees despite prevailing on the merits: Gollis (92/22)

Related to petition for enforcement: Wright (91/26)

MSPB includes OPM petition for reconsideration: Stone (90/34)

Enhancement of fees due to "risk": Jones (89/28)

Fees not awarded under § 7701(g)(2), absent discrimination finding: Mitchell (89/31)

"Lodestar" can be enhanced: Brown & Pitts (88/18)

Reimbursement of travel-related expenses: Garstkiewicz (88/20)

Services provided by previous attorney in related proceeding: Wiatr (88/21)

Union attorneys, market rate v. cost-plus: *Goodrich v. Navy* (38/5), cost-plus rejected by DC Cir. in *AFGE 3882 v. FLRA* (87/3), market rate adopted by FLRA in 46 F 89 (95/11)

Where the charges are sustained but the penalty is mitigated: Dunn (87/36)

After mitigation of penalty: Ciarla (81/20) ... Rose (84/20)

Removal settlement: Lokos (81/18)

Proper respondent during appeals from MSPB decisions: *Hagmeyer v. Treasury* (76/17)

Compensatory time in lieu of attorney fees: Drake (74/42)

Arbitrator can consider A-fee requests after award becomes final: 32 F 63 (72/15)

Settlement due to initiation of appeal: Shipp (70/34)

Award under both the Back Pay Act and the EAJA: *Massa v. DOD* (69/13)

Work performed in criminal proceedings: Boese (65/12)

Equal Access to Justice Act: *Olsen v. Commerce* (38/3) ... Mitchell (41/10) ... *Gavette v. OPM/Treasury* (58/16)

... *Keely v. MSPB* (59/8) ... *Devine v. NTEU* (62/10)

Interest of Justice: Ingram (55/26) ... Simmons (62/32)

Retirement appeals: Simmons (62/32)

Judicial review: Lizut (49/22) ... *Devine v. NTEU* (62/10)

Attorney representing union in ULP proceeding: 24 F 84 (62/16)

Performance-based actions: Hubbard (59/27) ... Blumenson (59/28) ... Grant (53/21) ... Young (53/15)

Denial of substantive Chapter 43 right: Grant (53/31) ... Hubbard (59/27)

Services on EEO complaint: Young (58/29)

Services on EEOC petitions: Barthel (58/31)

Services subsequent to issuance of initial Board decision: Weaver (57/32)

Settlement after filing MSPB appeal: *Cuthbertson v. MSPB* (57/32)

Determination of reasonableness: Johnson (47/28) ... *Crumbaker v. MSPB* (53/3)

Relief causally related to appeal: *Young v. MSPB* (53/15)

Services prior to agency decision: Brown (53/29)

"Substantially innocent" standard: *Yorkshire v. MSPB* (43/8) ... *Boese v. Air Force* (53/19) ... *Van Fossen v. MSPB* (58/14) ... *Wise v. MSPB* (53/7) ... *Thomson v. MSPB* (53/19)
 Staff attorney & actual costs: 21 F 106 (56/12) ... but see 46 F 89 (95/11)
 Partial attorney fees: 21 F 107 (56/12)
 No reasoned decision by arbitrator: 20 F 87 (52/15), but reconsidered and remanded to arbitrator in 21 F 26 (55/14)
 FLRA gives arbitrators detailed guidance on A-fees: 21 F 25 (55/9)
 No withdrawal of pay: 20 F 95 (52/15)
 Hatch Act: *Saldana v. MSPB* (52/12)
 ALJs under § 7521: *SSA v. Balaban* (50/30)
 Back Pay Act: *Lizut* (49/22)
 Pre-CSRA mixed cases: *West* (43/28)
 Customary billing rate: *Mitchell* (41/10)
 Retirement cases, authority to pay: *Cheeseman* (38/15)
 Denial, court's jurisdiction: *Hopkins v. MSPB* (34/12)

AUTOMATION. See **TECHNOLOGY.**

BACK PAY ACT--5 U.S.C. § 5596

Back pay when reinstated from an indefinite suspension: *Richardson and Mosley v Customs* (107/7)
 Back Pay Act a limitation on settlement agreements: *Stipp* (103/21)
 A period of relapse of an individual wrongfully removed for alcohol abuse does not negate the entitlement to back pay for the entire period of removal. *Hulsey* (102/26)
 BPA violated by USPS mitigation requirement: *Andress* (97/24)
 Employee not working pending a medical evaluation of his job offer: *Underwood, Laviene* (91/29)
 Offsetting back pay amount by retirement refund: *Harris* (89/33)
 Implicit causation standard: 41 F 50 (86/5)
 Backpay if placed in nonduty, nonpay status after rehabilitation: *Holly* (85/27)
 Relieved from obligation to pay back incarcerated employee: *Winslow* (82/32)
 Indefinite disabling condition: *Bivens* (81/26)
 Not ready, willing, and able: *Lamb* (80/28)
 Restoration to *status quo ante*: *Lavelle* (80/30)
 Time spent on active military duty, job search, and relocation expenses: *Naekel v. DOT* (73/15)
 Indictments or charges dropped in indefinite suspension cases: *Shaffer, Hernandez* (71/33)
 Award under both the Back Pay Act and the EAJA: *Massa v. DOD* (69/13)
 MSPB enforcement: *Ferry* (63/29)
 Ready, willing, and able to work: *Cruz* (63/30)
 Judicial review: *Lizut* (49/22) ... *Devine v. NTEU* (62/10)
 Effect of false statements on entitlement: *Harp v. Army* (60/17)
 Effect of acquittal in indefinite suspension cases: *Wiemers v. MSPB* (57/9)
 Back pay and interest: 7 F 9 (21/3) ... *Thomas* (54/34)
 Settlement agreement: *Cortez* (49/32)
 Board's jurisdiction to order: *Robinson* (38/9) ... *Spezzaferro* (43/36)
 Disputes over amount: *Tanaka* (38/11)
 Career ladders: 7 F 97 (23/10) ... 7 F 98 (23/10)
 Failure to give special consideration: 7 F 109 (23/10)
 Back pay and per diem: 7 F 32 (21/3)
 Findings necessary for an award of back pay: 32 F 162, 2nd par. on p. 1226 (NR)

BARGAINING UNIT DETERMINATIONS--§ 7112. See **UNIT DETERMINATIONS** and MGB No. 12.

BEEPERS

Responding to beepers only when in duty/pay status: *Marines v. FLRA* (91/13)
 Directing employees to carry and respond to beepers: 39 F 67, 90 FSIP 153 (84/5)
 Beepers and G-wide regulations on standby and on-call status: 39 F 67 (84/5)

BUDGET--§ 7106(a)(1)

FLRA clarifies first part of its budget test: 48 F 128 (101/14)
 For first time, FLRA finds proposal fails budget balancing test: 47 F 95 (98/17)
 Gainsharing formula violates 1st part of budget test: *Charleston Shipyard v. FLRA* (78/3), which is rejected by FLRA in 41 F 21 (86/9), but which is reiterated by 4th Circuit in *HHS, SSA v. FLRA* (95/5)
 Gainsharing: remand for explanation of what it means to "include" something in a budget: *Army v. FLRA* (94/4)
 Supreme Court on budget test: *Fort Stewart Schools v. FLRA* (81/5)
 Continuous furloughs: 22 F 29 (59/21), aff'd in *OPM v. FLRA* (68/3)
 Budget tests: (1) mandating programs & (2) balancing costs against compensating benefits: 6 F 76 (19/7)
 Pay and fringes: See cases cited under **PAY, FRINGES AND PAY ADMINISTRATION**.

BULLETIN BOARDS

First amendment rights not violated by an arbitration award holding that the union's bulletin board posting of messages critical of working conditions violated the CBA: 51 F 144 (114/8)

BURDEN OF PROOF

For acts of sexual misconduct, a double presumption exists that the proven misconduct harms the efficiency of service and creates a hostile work environment: *Pope v. USPS* (120/7)
 Different burdens of proof in disability discrimination cases, depending on whether appellant relies on direct or indirect evidence: Clark (119/10)
 Burdens of proof in discrimination cases under USERRA and Title VII of the Civil Rights Act of 1964: Duncan, Jasper (118/22)
 Noncompliance with protective order: burdens of proof: Cloonan (103/31)
 Attorney fees in enforcement proceedings: agency bears burden of proof. Wahley (103/26)

BYPASS

Bypass ULP involving an informal NGP step mandated by the CBA: 51 F 109 (113/12)
 Employee questionnaires: 19 F 48, 56, 94, 121 (49/8), upheld in *NTEU v. FLRA* and *OEA v. FLRA* (67/3)
 Compare 52 FLRA No. 134 (asking employees to choose among alternative ways of meeting a budget shortfall is a bypass ULP) (NR) with *NTEU v. FLRA* and *OEA v. FLRA*, 826 F.2d 114 (D.C. Cir. 1987) (soliciting information from unit employees regarding their conditions of employment, by itself, doesn't constitute a prohibited bypass; one must also consider the purpose of the solicitation) (67/3).

CERTIFICATION OF REPRESENTATIVE. See UNIT DETERMINATION and DECERTIFICATION OF REPRESENTATIVE.**CHARGES**

Sustaining AWOL charge even when part of the AWOL charge isn't upheld: Robb (123/17)
 False statements charges appropriate where appellant's response to agency investigator goes beyond "mere denial" and constitutes a false "cover story": Kirkpatrick (121/19)
 An administrative judge may look behind the charge as written when the charge implies an intent not stated in the charge itself: Crouse (120/17)
 Narrative charge is acceptable: Otero (117/13)
 Where the charge does not contain an element of intent, such as disruptive behavior, the agency is not required to prove more than it has charged: McCarty (117/20)
 Denial of charge & underlying facts can't be basis for falsification charge: *King v. Erickson* (116/5)
 Bifurcation of charges in ch. 75 appeals generally not appropriate: Stein-Verbit (116/17)
 An agency may not charge an employee with falsification based on an employee's denial of a charge or its underlying facts. *King v. Erickson* (116/5) ... under review by the Supreme Court
 Proving theft: *King v. Nazelrod and MSPB* (107/11)
 Two separate acts of misconduct that are not dependent upon each other: *Chauvin v. Navy* (106/10)
 Definition of "theft" applies to the taking of photocopies: Heath (105/19)
 Removal must be reversed when reasons for removal aren't those of the proposed action: O'Conner (102/36)
 Distinguishing between charges and the language that supports and discusses them: Diaz (97/26)

CLASSIFICATION. See POSITION CLASSIFICATION.

COMMITTEES. Also see MGB # 30 (pp. 9-12).

Passive participation where deliberations are protected. *AFGE 2094 v. FLRA* and *AFGE 2298 v. FLRA* (69/6)
 Union representation on promotion panel: 19 F 81 (50/20), aff'd *NFFE v. FLRA* (68/5) ... 28 F 82 (67/13)
 Union representation on incentive awards committees. See **INCENTIVE AWARDS**.
 To recommend changes in performance appraisal system: 7 F 34 (21/13)
 Safety committees: 11 F 63 ... 19 F 50 ... 21 F 83
 Union participation on mgmt's position mgmt committee: 9 F 139 (NR)
 Curriculum committee participation by union: 19 F 99, #10 (NR)

COMPELLING NEED--§ 7117(b). Also see MGB # 16 (pp. 32 - 36).

No C-need for no-smoking policy: *HHS v. FLRA* (83/3)
 Pay: 14 F 84 (39/10), reaffirmed in 21 F 36, but reversed in *NTEU v. FLRA* (64/6) ... *DODDS v. FLRA* (latter mooted) (70/6) ... *West Point v. FLRA* (73/3) ... *Fort Steward Schools v. FLRA* (74/4) and (81/5) ... *Fort Shafter v. FLRA* (82/5)
 No elements of C-need determination will be made in ULP proceeding: 32 F 73 (72/13)
 C-need determinations may not be made in ULP proceedings: *FLRA v. Army* (Sup Crt decision) (71/3), agreeing with 4th Circuit's review of 21 F 100 in *Army Engineers v. FLRA* (47/14), but disagreeing with D.C. Circuit's review of 12 F 86 (32/5) in *DLA v. FLRA* (45/8)
 Monetary savings insufficient to establish C-need: 24 F 7 (61/9)
 Appropriation bill's conference report as "outside authority": *NFFE 1699 v. FLRA* (41/6)
 No C-need for selection deadlines: 14 F 84 (39/10)
 No C-need for suggestion awards formula: 14 F 84 (39/10)
 No C-need for agency's general travel regulations: 14 F 84 (39/10)
 Burden of supporting C-need assertion: 7 F 52 (22/8)
 No C-need for FDIC's performance appraisal regulations: 7 F 34 (21/13)

COMPLIANCE

"Overriding circumstances" standard applies to mitigated removals: *Holtgrewe* (98/26)
 Putting successful appellant on administrative leave because of subsequent criminal conviction: *Payne* (95/29)
 Interim relief: *Wallace* (86/31)
 Agency breached settlement agreement: *Miller* (80/24)
 Restoration to *status quo ante*: *Lavelle* (80/30)
 Employee's failure to resign: *McClain* (77/30)
 Disruptive behavior by employee after reinstatement: *Saal* (75/22)
Status quo ante: *Mann* (54/29) ... *Wittl* (71/36) ... *Nielson* (65/19)
 Expungement of records: *Rose* (65/15)
 Extent of agency obligations in settlement agreement: *Myers* (54/27)
 Board's continuing jurisdiction: *Swafford* (52/26)

CONDITIONS OF EMPLOYMENT--§ 7103(a)(14). See also MGB # 36 (pp. 3 - 7).

3 F 66, temporarily abandoned in 49 F 102, is reaffirmed: management can elect to bargain on the working conditions of supervisors and managers: 52 F 65 (116/13)
 Proposals directly implicating the working conditions of supervisors are outside the mandatory scope of bargaining: 52 F 80 (116/11)
 3 proposals directly implicating COE of supervisors not a mandatory subject of bargaining: 52 F 80 (116/11)
 Management can elect to bargain on working conditions of sups and mgrs: 52 F 65 (116/13)
 Sexual harassment provision is nonnegotiable because it deals with a matter specifically provided for by 42 U.S.C. § 2000e-16(c): *INS v. FLRA* (99/9)
 Pay & fringes: 12 F 100 (33/16) ... 24 F 41 (62/23) ... *Navy v. FLRA* (70/6) ... *Treasury v. FLRA* (70/6) ... *DODDS v. FLRA* (latter mooted) (70/6) ... *West Point Schools v. FLRA* (73/3) ... *NRC v. FLRA* and *Fort Stewart Schools v. FLRA* (74/4) ... *DODDS v. FLRA* (75/10) ... *Fort Stewart v. FLRA*, Sup. Crt. decision (81/5) ... *FDIC v. FLRA* (94/3)
 Health insurance premiums: *FDIC v. FLRA* (94/3)
 Procedure for selecting supervisory backups principally relates to COE of unit employees: 45 F 112 (93/24)
 COE for § 704 prevailing rate employees broader than "pay practices": *USIA v. FLRA* (80/8) SOB for § 704 limited by § 704: 41 F 1 (86/11). DC Cir. remands work jurisdiction case: *VOA v. FLRA* (91/17)
 FLRA found to have been misapplying the "vitally affects" test: *Naval Aviation v. FLRA* (89/5) ... FLRA

consequently modifies the test: 43 F 106 (89/5)
 No duty to negotiate COE of Title 38 employees: *Colorado Nurses Assn v. FLRA* (73/13) ... *AFGE 3884 v. FLRA* (85/3) ... But see DVA Health Care Personnel Act of 1991, P.L. 102-40
 Administrative leave for functions unrelated to work (Boy Scout or Girl Scout functions) is a COE: 40 F 38, #2 (85/7)
 Negotiability of proposals impacting on nonunit employees: 25 F 82 (63/15), reversed in 33 F 41, *et al.* (74/22), which was aff'd in *OPM v. FLRA* and *NRC v. FLRA* (81/3)
 RIF C-areas: application of "vitally affects" test: 33 F 41, 52, 68, 69 (74/22), aff'd in *OPM v. FLRA* and *NRC v. FLRA* (81/3)
 Agency disapproval of a carryover provision is a change in COE: *Montana Assn of Civ Techs v. FLRA* (80/5)
 RIF C-areas that include nonunit employees: 8 F 46 (25/6), 9 F 81 (28/7), 22 F 49 (58/35), 33 F 41 (74/22)
 Employee questionnaires: 19 F 48, 56, 94, 121 (49/8), aff'd in *NTEU v. FLRA* and *OEA v. FLRA* (67/3)
 A non-COE past practice can't "ripen" into a COE: 27 F 45 (65/12) ... but see *AFGE v. FLRA* (76/14) for narrow exceptions to rule.
 Reenlistment in the National Guard: 20 F 85 (52/18)
 Duties of nonunit employees: 6 F 106 (20/11) ... 19 F 99 (49/13)
 Making launch available for recreation: 18 F 43 (47/23)
 Recommendations to third parties: 7 F 89 (23/7), aff'd in *LOC v. FLRA* (30/15)
 Restricting management access to internal investigatory files: 8 F 75 (25/8)
 Political action fund withholding: 6 F 106 (20/11)
 Informing taxpayer that fone call may be monitored: 6 F 98 (19/15)
 Overtime rate of compensation: 3 F 85, aff'd in *AFGE v. FLRA* (17/3)
 Size of bargaining team: 3 F 14, aff'd in *AFGE v. FLRA* (17/3)
 Naming union reps for NGP & midterm bargaining: 4 F 39 (11/3)
 Storage area for private weapons: 4 F 25 (10/9)
 Management can elect not to bargain on COE of unorganized non-unit employees: 3 F 66 (9/1)
 Filling positions outside unit: 3 F 14 (6/9) ... 3 F 44 (7/9) ... 3 F 66 (9/1) ... 5 F 45 (15/3) ... 6 F 96 (20/3) ...
 But see 25 F 36 and 34 F 100 (NR), on scope of NGP.
 Quality circles a permissive subject of bargaining: 29 F 96 @ 1257. (NR)

CONFLICT OF INTEREST. See **STANDARDS OF EMPLOYEE CONDUCT.**

CONTRACTING OUT--§ 7106(a)(2)(B). Also see MGB No. 21.

FLRA affirms award in which the arbitrator held that grievances seeking to enforce the requirements of OMB Circular A-76 are nongrievable and nonarbitrable: 52 F 70 (116/15)
 D.C. Circuit says that alleged violations of A-76 can't be grieved under the NGP: *IRS v. FLRA*; *Justice v. FLRA*; *Public Debt v. FLRA*. (98/3) ... Adopted by FLRA in 48 F 15 (99/19)
 Remedies for contracting-out violations. 22 F 72; 23 F 22, 23, 26 (58/18) ... modified to permit arbitrators to terminate contracts and convert activity to in-house performance: 43 F 64 (89/19)
 FLRA holds that OMB Cir. A-76 is an "applicable law": 42 F 92 (88/9)
 Supreme Court on contracting out right: *Treasury v. FLRA* (81/8)
 Contracting-out grievances and scope of NGP: 10 F 1 (28/12), aff'd in *EEOC V. FLRA* (41/3), review denied by Sup Crt in *EEOC v. FLRA* (56/3) ... 17 F 66 (46/19) ... *DLI v. FLRA* (49/3) ... 22 F 106, reversed in *HHS v. FLRA* (71/5) ... *IRS v. FLRA* (75/13), rejected by Sup. Crt. in *Treasury v. FLRA* (81/8)
 "Zone of interest" test for standing under APC: *NFFE v. Cheney* (78/15)
 Cost studies: 17 F 66 and 96 (46/19) ... 19 F 118 (50/11)
 Delaying procurement until grievance settled: 27 F 109 (66/22), reversed by D.C. Cir. in *IRS v. FLRA* (75/13)
 Notifying union of bid solicitation actions: 10 F 1 (28/12)
 C-out and information disclosure--milestone charts: 6 F 105 (20/7), aff'd in *NFFE v. FLRA* (27/3)
 Union presence at bid conferences: 6 F 105 (20/7), aff'd in *NFFE v. FLRA* (27/3)
 Barring contracting out when in-house performance more economical: 6 F 105 (20/7)
 Barring c-out of normal services deemed essential to mission by mgmt: 6 F 105 (20/7)
 Minimizing adverse impact of considering attrition and restrictions on new hires: 6 F 105 (20/7).
 Relevance of contracting-out information to grievance: 6 F 24 (17/15)
 See **APPROPRIATE ARRANGEMENTS** for adverse impact cases.

CONTRACT REVIEW--§ 7114(c). See **AGREEMENT, NEGOTIATED.**

CORRECTIVE ACTION

Erroneous appointment: Hatfield (51/28)

Illegal pay rate: Warren, et al. (47/35)
 Due process under Chapter 75: Travaglini (42/27)

COVERED BY DOCTRINE. See MIDTERM BARGAINING.

CREDITING PLANS

Disclosure of crediting plans under § 7114(b)(4): 26 F 52 and 79 (64/13) ... court requires a "particularized need/countervailing interest" analysis: *Prisons v. FLRA* (96/3)
 Disclosure not "necessary" to negotiate content of plans: 26 F 98 (64/13)
 Disclosure of crediting plans under FOIA: *NTEU v. Customs* (62/13)
 Blanket disclosure of c-plans barred by G-wide regulations: 23 F 91 (62/28). But see 26 F 52.
 Crediting plans must be based on job analysis: *Treasury v. FLRA* (47/12) ... 19 F 112 & 133, 20 F 49 (50/14)
 Crediting plans and personnel conducting operations: *Customs v. FLRA* (39/3)

CRIMINAL CHARGES

Clarifies continuance past the termination of criminal proceeding: Shaffer, Hernandez, Torres (71/33)
 Effect on appellant's subsequent litigation: Crofoot v. GPO, *Loveland v. Air Force*, *Raymond v. Army* (70/17)
 Off-duty misconduct: *Allred v. HHS* (59/11) ... Kruger, et al. (62/29) ... *Dominguez v. Air Force* (60/7) ... *Graybill v. USPS* (60/10)
 Possession with intent to distribute marijuana: Harrison (40/12)
 Possession and sale of drugs: Jaworski (40/13) ... Poe (40/16)
 Assault with weapon: Abrams (40/14) ... Backus (40/18)
 Off-duty intoxication: Honeycutt (40/17) ... Franks (40/20)
 Sexual assault against minor: *Hayes v. Navy* (35/6) ... Williams, Graybill (40/19) ... Larson (45/29)
 Sexual offenses and assault: Johnson (40/10)
 Failure to file tax return: Cox (39/28)
 Mail fraud: Robinson (38/9)

DEBT COLLECTION. Also see MGB No. 17.

Arbitrators can review hearing officers' debt determinations: 32 F 105 (73/22)
 Grieving indebtedness determinations under the NGP: 22 F 14 (57/15)
 Waiver of interest and penalty charges: 21 F 20 (55/15)

DECERTIFICATION OF REPRESENTATIVE

Certification not revoked despite a finding that the unit no longer is appropriate: 45 F 25 (92/13)
 PATCO decertified for striking: 7 F 10 (21/5), aff'd in *PATCO v. FLRA* (26/6)

DENIAL OF WITHIN-GRADES

When denial of WIGI not based on current rating of record is a harmless procedural error. Bowden (102/32)

DETAILS. Also see MGB # 20 (pp. xv and xvi).

Procedures for selecting employees for detail are NN when mgmt determines that only one employee is qualified to perform the duties of the detail: 53 F 47 (120/8)
 "Objective" qual stds for selecting employees is an appropriate arrangement: 41 F 58 (87/19)
 NGP and infractions committed while an acting supervisor: *Devine v. Levin* (39/6), reversed in *Hess v. IRS* (79/3)
 Temporary promotions: 2 F 77 (4/5), aff'd in *Dix-McGuire v. FLRA* and *AFLC v. FLRA* (18/3) ... 4 F 52 (11/13) ... 11 F 7 (30/7) ... *AFGE 1923 v. FLRA* (59/7), affirming 17 F 93
 Performance during details: Smith (57/28)
 Detail selection procedures where management determines the employees are not equally qualified: 2 F 77 (4/5), aff'd in *Dix-McGuire v. FLRA* and *AFLC v. FLRA* (18/3) ... 8 F 75 (25/8). See also **SENIORITY**.
 Detail rosters: 7 F 45 (22/5)
 Inapplicability of § 7106(a)(2)(C) to detail proposals: 7 F 45 (22/5)
 Duration of details and right to assign employees: 7 F 45 (22/5)
 Retaining contractual rights when detailed outside unit isn't a COE: 17 F 6 (NR)
 Detail selection procedures for equally-qualified employees: 9 F 84 (NR) ... 23 F 7 (NR)

DIRECT EMPLOYEES--§ 7106(a)(2)(A). Also see **PERFORMANCE** and MGB 36, p. 20.

The right to supervise and guide employees: 3 F 119 (8/3), affirmed in *NTEU v. FLRA*, 691 F2d 553 (10/12/82).
NR.

Teachers following directives of military personnel: 22 F 34, #5. (N/R)

Union presence at all meetings with mgmt E-I's with right to supervise: 25 F 21, #17 (N/R)

DISCIPLINE EMPLOYEES (i.e., suspend, remove, reduce in grade or pay, or other)--§ 7106(a)(2)(A). Also see **LAST CHANCE AGREEMENTS, SUSPENSIONS**, MGB No. 29.

Inadequately detailed notice of misconduct a denial of due process: *Mason* (113/14)

Conditions to meet in removing employee because of physical inability to do job: *Spencer* (117/15)

Part 752 applies to nonpreference excepted service employees only when converted to competitive service:
Kane (102/22)

Annual destruction of records of counseling/admonishment is NN: 46 F 143 (96/13)

Discipline for interfering with investigation and intimidating witnesses: *Taylor* (87/39)

Disciplining employees for not carrying or responding to beepers: 39 F 67 (84/5)

Abrogation test used to enforce provision establishing a deadline for initiating disciplinary action: 38 F 21 (82/15)

Discipline of employees on 100% official time: 35 F 126 (81/15)

Arbitrator misapplied *Rankin* free speech test: 32 F 2 (74/25)

Reopening expedited award for evidence of protected activities: 32 F 40 (72/21)

Off-duty misconduct: 31 F 94, #3 (71/24)

Barring discipline when work refusal is due to safety hazards: 25 F 9 (63/23)

Investigation deadlines: 17 F 45 (46/22) ... *NFFE 615 v. FLRA* (60/5)

Informing union of disciplinary actions: *AFGE 1345 v. FLRA* (58/6) ... 25 F 89 (NR) ... 32 F 8 (NR) ... 38 F 110 (NR)

Job retention preference for union officials: 19 F 117 (51/26)

Prohibiting the assignment of certain absences to AWOL: 19 F 6 (48/10)

Sequential discipline: 9 F 142 (29/1) ... 18 F 42 (47/25).

Employee silence and duty to account: *Pearl Harbor Public Works v. FLRA* (25/2)

Drug/alcoholism program and immunity to discipline: 6 F 98 (19/15)

Use of information obtained from monitoring telephone: 6 F 98 (19/15)

Records maintenance: 80 FSIP 53 (12/3)

Removing certain employees before reducing hours of others: 3 F 1 (5/13)

Progressive discipline: 31 F 32, #19 @ pp. 406-7 (NR)

DISCRETION. Also see MSB No. 16 (pp. 9 & 10).

Pay-setting discretion under 5 USC 5349 not sole & exclusive: *BEP v. FLRA* (113/5)

Right of GSA Administrator to terminate practice of carrying firearms home: *GSA v FLRA* (113/3)

Pay/benefits proposals NN--Dir. of Office of Thrift Supervision has sole discretion over pay and benefits: *AFGE 3295 v. FLRA* (106/6)

Discretion in setting pay: 12 F 100 (33/16) ... 24 F 41 (62/23) ... *Navy v. FLRA*, *Treasury v. FLRA*, and *DODDS v. FLRA* (later mooted) (70/6)

Recommendations to third party agencies with authority to implement: 6 F 76 (19/7) ... 7 F 89 (23/7), affirmed in *Library of Congress v. FLRA* (30/15)
 Delegation of authority and duty to bargain: 10 F 17 (28/15)

DISCRIMINATION--EEO AND OTHER NON-LMR

Appellant may be entitled to reasonable amount of annual leave to consult an attorney where issues of discrimination are raised in the appeal: Forrest (121/17)
 In proving a claim of disability discrimination, the appellant must show a causal connection between his disability and the charged misconduct: Roseman (120/17)
 For acts of sexual misconduct, a double presumption exists that the proven misconduct harms the efficiency of the service and creates a hostile work environment: *Pope v. USPS* (120/7)
 Analysis of sexual harassment charge: consider the alleged misconduct from the victim's perspective and examine cumulative effect of the misconduct: Payne (119/15)
 Different burdens of proof in disability discrimination cases, depending on whether appellant relies on direct or indirect evidence: Clark (119/10)
 An employee may raise allegations of a hostile work environment brought about by harassment based on his prior military service: Peterson (116/20)
 Discrimination based on previous military service: Peterson (116/20)
 Because perception of disability was inconsistent with employee's ability to perform, management was guilty of disability discrimination: Yates (114/15)
 Agency liability for actions of nonemployee who sexually harasses an employee: Brown (109/19)
 Compensatory damages for emotional distress: Roundtree; Carpenter; Browne: (109/16)
 Compensatory damages available in the administrative process: Runyon (95/26); Hocker (104/11)
 Allocation of burdens and order of presentation: legitimate "subjective" reasons: 44 F 100 (91/21)
 IRA amendment of EEO complaint: Horton (85/18)
 Probationary employees alleging discrimination: *NTEU v. FLRA* (72/5)
 Evidence of drug abuse/addiction at time misconduct occurred: McCaffrey (72/28)
 Withdrawal of reasonable accommodation: Watson (64/38)
 Probationer can't use NGP to process discrimination claim: 25 F 90 (63/14)
 When election of forums is made: 23 F 60, 78 (60/23)
 EEO precomplaint meeting as a formal discussion: 7 F 54 (24/3), enforcement denied in *IRS v. FLRA* (31/11) ... 23 F 60, 70 (60/23). But see 29 F 52 (NR).
 Informal settlements: 23 F 6 (59/17) ... Comp. Gen. guidelines for monetary awards: (31/17)
 Marital status: *Stokes v. FAA* (47/16)
 Racial discrimination, standing alone, isn't a ULP: 5-CA-50015 (45/13)
 Handicap not related to job: Clemons and Nichols (43/23)
 Untimely appeal: McKeithan (43/32)
 Selecting union-nominated EEO Counselors: 2 F 77 (5/4)

DISCRIMINATION--§ 7102 (PROTECTED LMR ACTIVITIES)

Probationary employee not discharged because of protected activities but because he made "mad laughter" telephone calls: *Midder v. FLRA* (119/4)
 Burden of proof in "mixed motive" and "pretextual" cases: 35 F 15 (80/17)
 Reopening expedited award to determine whether protected activities involved: 32 F 40 (72/21)
 Mixed motive cases and the *Mt. Healthy* requirements: 6 F 23 (17/13) ... *AFGE SSA Council v. FLRA*, affirming 9 F 11 (32/12). Cf. 2 F 118 (5/11)

DISTRIBUTION OF LITERATURE

FLRA asked to reconsider an interpretation that may be at odds with the Constitution: *NTEU v. FLRA* (96/6)
 Constitutional right to distribute literature on SSA campus sidewalks: *NTEU v. King* (93/14)

DRUG TESTING. See also MGB No. 35 and ALCOHOLISM AND DRUG ABUSE

The "reasonable suspicion" determination is based on factual information at time of the determination: *Garrison v Justice* (112/4)

Reasonable suspicion sufficient when made isn't rendered invalid as result of later new information: *Garrison* (107/22)
 Alleged violation of chain of custody is a procedural error subject to harmful error rule: *Frank v. DOT* (105/9)
 Removal on second finding of illegal drug use: *Burrell* (99/26)
 Overbroad substance abuse proposals are nonnegotiable: 43 F 114 (89/13)
 Removal of employee refusing to submit to random drug test is constitutional: *Watson* (87/22)
 Entitlement to immunity: *Savage* (86/18)
 Requiring that drug testing be conducted in accord with laws and regulations doesn't excessively interfere with the internal security right: 38 F 89 (83/6)
 Giving nonmedical person authority to evaluate claims of medical mistake: *Army v. FLRA* (79/5)
 Random drug tests constitutional: *Harmon v. Thornburgh*, *NFFE v. Cheney*, *AFGE v. Cheney*, *AFGE v. Skinner* (78/9)
 Supreme Court holds that suspicionless drug tests of certain employees are reasonable searches: *NTEU v. Customs* (76/3)
 Misc. drug-testing proposals: 30 F 115 - 117; 31 F 7, 10 - 12, 15 - 17, 23 - 25 (70/20-27)

DUAL EMPLOYMENT

Outside employment resulting in conflict of interest: 14 F 84 (39/10)

DUE PROCESS

Inadequately detailed notice of misconduct a denial of due process: *Mason* (113/14)
 MSPB limited to determining whether due process was afforded when removal is based on loss of security clearance: *Drumheller v. Army* (107/6)
 Due process when an indefinite suspension is based on temporary loss of security access: *Kriner, Alston* (104/35)
 Action meeting minimum due process will be reversed only if procedural error is harmful: *Stephen* (86/42)
 Communications with union representative are privileged: 38 F 103 (84/13)
 Opportunity to reply: *Darnell v. DOT/FAA* (62/8)
 Shortened notice period: *Smith v. USPS* (56/5)
 Crime provision procedures: *Mack* (49/28)
 Discipline for making false statements about alleged misconduct: *Lachance v. Erickson* (Sup Crt) (NR)

DUES--§ 7115

Process for dealing with over- or underpayment of remittances not contra 5 CFR 550.312: 52 F 117 (117/5)
 Preventing revocation for periods exceeding a year: 40 F 60, #9 (85/11)
 Options to be given reinstated employee: *AFGE 1843 v. FLRA* (72/7)
 Options to be given reinstated employees: 25 F 40 (63/19)
 Using setoff to recoup erroneously withheld dues: 23 F 54 (60/25) ... reversed in *AFGE v. FLRA* (69/5) ... adopted by FLRA in 31 F 54 (NR)
 10-day revocation window is reasonable: 19 F 77 (49/11)
 Recouping union dues from employees: 3-CA-40444 (44/32)
 Circumstances when employees should not be reimbursed for erroneously withheld dues: *Comp. Gen. B-212695* (37/10)
 Terminating dues of employees temporarily promoted to supervisor: 7 F 54 (24/3) ... automatically resuming checkoff of detailee returning to unit: 25 F 14 (NR)
 Waiver of one-year checkoff period: 2-CA-564 (16/15)
 Cancelling allotments when employee leaves unit: *Comp. Gen. B-180095* (10/11)
 Processing new authorizations during pendency of RA petition: 2 F 105 (5/7)
 Involuntary withholding: 1 F 64 (1/3)

DUTY OF FAIR REPRESENTATION--§§ 7114(a)(1)

Members only poll on seniority system administered by union breaches fair representation duty: 49 F 71 (102/15)
 No duty re proposed D-action where nonmember has right to select representative: 46 F 81 (94/11)
 Private course of action not conferred by CSRA: *Karahalios v. NFFE* (79/10)
 Duty limited to matters over which union has exclusive jurisdiction (reversal of 16 F 102): *NTEU v. FLRA* (59/3).
 Limiting attorney representation to members: *NTEU v. FLRA*, affirming 10 F 91 (33/8)
 Disparate treatment of nonunion members: 1 F 104 (1/9)

Conduct not arbitrary, perfunctory, or done in bad faith: I F 112 (1/13)
 Requiring nonmembers to pay certain arbitration costs is NN: 38 F 57 (NR)
 Charging disparate fees to nonmembers in civil suit not a ULP: 30 F 9 (NR)

ELECTIONS. Also see MGB No. 12.

Limiting attorney representation to members: *NTEU v. FLRA*, affirming 10 F 91 (33/8)
 Self-determination elections: 3 F 17 (6/11) ... 5 F 20 (14/5) ... 6 F 55 (19/3)

EMERGENCIES--§§ 7106(a)(2)(D)

Overriding exigency for management to act: 3-CA-2909, SSA, 1/13/82 (23/3) ... 4-CA-856, 12/28/81 (23/3)
 Officials verifying existence of emergency: 7 F 52 (22/8)

EMPLOYEE QUESTIONNAIRES. See **BYPASS**

ENFORCEMENT

Agency breach of settlement agreement: Miller (80/24)
 Restoration to *status quo ante*: Lavelle (80/30)
Status quo ante: Mann (54/29) ... Wittl (71/36) ... Nielson (65/19)
 Back pay awards: Ferry (63/29)
 Stays: Jenkins (60/33)
 FLRA enforcement of adverse action awards: 22 F 20 (57/13)
 Compliance and Jurisdiction: Swafford (52/26)
 Board's authority in suitability cases: Schaefer (49/24)
 Board's authority to order restoration: *Kerr v. NEA* (34/8)
 Board's authority to review reassignment: Sarver (38/18)

EQUIPMENT. See **METHODS AND MEANS OF PERFORMING WORK**

ESTOPPEL

MSPB applies collateral estoppel to an arbitration award: Gamble (86/32)
 Effect of appellant's subsequent litigation: *Crofoot v. GPO*, *Loveland v. Air Force*,
Raymond v. Army (70/17)
 Conviction affecting worker's compensation claim: *Crofoot v. GPO* (50/9)
 Relitigating issues: Mortensen (50/32)
 Effect on appellant's subsequent litigation: *Crofoot* (38/20)

EVIDENCE

MSPB doesn't apply exclusionary rule to bar use of illegally obtained evidence in MSPB proceedings: Delk (99/35)
 Medical evidence: *Wale v. Navy* (68/6)
 Proposal notice as evidence: Gill (68/26)
 Multiplicity of charges: *Southers v. VA* (66/10)
 Knowing misconduct: *Massa v. DOD* (66/11) ... *Dupont v. NAVY* (66/11)
 Substantial evidence, Part 432: Luscri (66/25)
 Hearsay: Sanders (60/10)
 Circumstantial evidence: Davis (52/25) ... Mojica-Otero (59/32)
 Nondisclosure of privileged information: Rooney (45/21)
 RIF notice as evidence: Rosen (41/15)
 Witnesses: Jefferson (39/27) ... Williams (40/19)
 Appellant's case before MSPB: Naekel (40/26)

Lay evidence of intoxication: *Peru* (39/22)
 Circumstantial evidence: *Jefferson* (39/27)
 Failure to testify, adverse inferences: *Adams v. Transportation* (37/14)

EXCEPTED SERVICE EMPLOYEES

Issue of "implied repeal" when a general legislative change is made to a statute from which there have been various exceptions by statute ... appeal rights of some nonpreference excepted service employees: *Tod v DOD* (108/5)
 Nonpreference excepted service: prior temporary service not creditable towards 2-year requirement: *Forest v. MSPB* (107/9)
 Part 752 applies to nonpreference excepted service employees only when converted to competitive service: *Kane* (102/22)
 NEES (nonpreference-eligible excepted service) employees can't use NGP to challenge removals: *HHS v. FLRA* (74/7) ... *Treasury v. FLRA* (76/7), but new law gives them access after 2-year probationary period: 39 F 5, ##16 & 17 (84/9)
 Bump & retreat rights for excepted service employees: *NRC v. FLRA* (80/11) ... *MSPB v. FLRA* (82/6)
 Bump & retreat rights for excepted service employees: *NRC v. FLRA* (80/11)
 No arbitral review of performance-based actions against nonpreference excepted service employees: *HHS v. FLRA* (74/7) ... But law was changed: See 104 Stat. 461, cited in 39 F 5, ## 16 & 17.
 No right to judicial review for nonpreference eligible excepted service employee: *Harrison v. Bowen* (67/9)
 Access to NGP by excepted service employees: 25 F 94 (63/12)

EXCEPTIONS TO AWARDS. See MGB No. 38.

The 9th Circuit says it lacks jurisdiction to review a FLRA decision on exceptions to an arbitration award where the award does not involve a ULP: *NTEU v. FLRA* (118/4)
Leedom v. Kyne appeal of Authority AR decisions: *Prisons v. FLRA* (95/3). Also see *Interior v. FLRA*, No. 92-9503 (10th Cir. 7/27/93) (NR)
 Nonfact argument rejected where arbitrator's misapprehension is the fault of the parties: 45 F 60 (92/8)

EXCESSIVE INTERFERENCE--§§ 7106(b)(3). See APPROPRIATE ARRANGEMENTS.

EXECUTIVE ORDER

FLRA, finding that § 2(d) of EO 12871 (Order) does not constitute an election to bargain over § 7106(b)(1) subjects, said that "[q]uestions concerning the Respondent's compliance with the [Order] . . . are properly resolved as a matter involving the internal management of the Executive branch." 54 F 43 (124/10)
 Draft guidance on EO 12871: (100/13)
 EO 12871, Labor-Management Partnerships, Oct. 1, 1993. (99/3)
 EO 12564, on drug testing, is a "law" within meaning of § 7117(a)(1). 30 F 115 (70/26). Cf. § 7106(a)(2)'s reference to "applicable laws"--see **MANAGEMENT RIGHTS**.
 EO 12391, Partial Suspension of Federal Service LMR, Nov. 4, 1982. (29/11)

EX PARTE COMMUNICATION

Failure to provide opportunity to respond: *Holm* (76/29)
 New deciding official: *Monroe v. Treasury* (51/77)
 Proper communication: *Andersen* (48/23)

FACILITIES & SERVICES

§ 704 doesn't bar negotiating matters not bargained before 8/19/72: 41 F 1 (86/11)
 Storage space, office size, partitions, space layout, doors, showers, lockers, first aid facility: 7 F 89 (23/7)
 Use of generic terms "equipment" and "facilities": 7 F 89 (23/7)
 Day care facilities: 2 F 77 (4/5) ... 6 F 76 (19/7)
 Annual vision screening: 81 FSIP 7 (16/9)
 Parking: 3 F 118 (8/12)
 Telephones: 2 F 77 (4/5). Also see 24 F 45 (NR)

FALSE STATEMENTS

Agency may not charge employee for making false statements about alleged misconduct: Walsh (104/22) . . . affirmed by Fed. Cir. in *King v. Erickson*, 89 F.3d 175 (1996) (116/5) ... Reversed by the Supreme Court in *LaChance v. Erickson*, not reported in *Significant Cases*. See, instead, *New Developments*, March 1998, p. 21.

FALSIFICATION OF RECORD

False statements charges appropriate where appellant's response to agency investigator goes beyond "mere denial" and constitutes a false "cover story": Kirkpatrick (121/19)
 Proof of financial gain not necessary to show falsification, but its absence may bear on reasonableness of penalty for falsification: Seas (121/154)
 Several AJ errors addressed by MSPB: Beardsley (95/24)
 Proof of intent: Katchmeric (6/26) ... Forsha (66/26)
 Adverse actions by OPM: *Kissner v. OPM* (60/16)

FILLING POSITIONS. See **VACANCIES**.

FLEXITIME. See **HOURS OF WORK**.

FORMAL DISCUSSIONS--§ 7114(a)(2)(A). Also see MGB No. 30 (pages 2 - 4).

Discussions conducted by a neutral third party can nonetheless be formal discussions. 54 F 75 (125/5)0
 "[U]nder the plain wording of section 7114(a)(2)(A), a union has a right to be represented at formal discussions without regard to the Privacy Act[.]" 53 F 73 (121/13)
 Formal discussion ULP involving an informal NGP step mandated by the CBA: 51 F 109 (113/12)
 Attorney telephone interview of witness is a formal discussion: *DVA v. FLRA* (102/9)
 Attorney interviews in preparation for MSPB or arbitration hearings: *DVA v. FLRA* (99/7)
 Union role limited when taking depositions under MSPB's rules: 47 F 11 (96/11)
 Employee can elect to be represented by a lawyer at the oral reply of a proposed adverse action; nor does the union have a right to be present as an oral reply is not a grievance. 29 F 52, affirmed by DC Cir. in *AFGE v. FLRA*, 865 F.2d 1283 (75/3)
 MSPB preparation, adverse witnesses: 15 F 87 (40/6), reversed in *NTEU v. FLRA* (51/9) and adopted by FLRA in 29 F 53 (68/18)
 Notice to union even though there's actual presence: 19 F 122 (49/19) ... reversed in 29 F 53 (68/18)
 EEO precomplaint meeting: 7 F 54 (24/3), enforcement denied in *IRS v. FLRA* ... (31/11) ... 23 F 60 & 78 (60/23)
 Pretrial interviews of adverse witnesses: *NTEU v. FLRA* (51/9), adopted by FLRA in 29 F 53 (68/18). Cf. 41 F 72, # 9, re prehearing discovery provisions: (87/14)
 Factors determining the "formality" of a discussion: 10 F 24 (29/3)
 Noncoercive pretrial interviews: 9 F 132, 9 F 134 (28/9). Cf. 41 F 72, # 9 re negotiated prehearing provisions: (87/14)
 Medical-dental staff meetings: 5-CA-1226 (23/15)
 Obtaining information on OTJ injuries: 6-CA-1139 (23/16)
 Orientation sessions: 5 F 58 (16/3)
 Official time for formal discussions: 2-CA-400 (14/13)

FREE SPEECH--§ 7116(e)

INS's anti-adornment policy a minimal intrusion on the free speech rights of union employees: 38 F 101 (90/3)
 The effective functioning of the agency outweighed the grievant's right of free speech: 33 F 2 (74/25)
 Free speech balancing test: *Fiorillo v. Justice*; *Stanek v. DOT*; *Mings v. Justice* (72/10)
 Personal views in context of a non-representational election: 6 F 32 (18/7)

FREEDOM OF INFORMATION ACT. See **INFORMATION**.

FURLOUGH

Lack of work: *Horner v. Schuck, et al.*, and *Horner v. James, et al.* (74/12)
 Use of RIF or adverse procedures: Clerman, Dolan, Dowell (70/35)
 Continuous furloughs & excessive interference: 22 F 29 (59/21) ... affirmed in *OPM v. FLRA* (68/3)
 Validity of OPM emergency furlough regulations: Hastie and Lowe (42/31) .. *Horner v. Andrzejewski* (62/3)
 Emergency furlough: *Horner v. Andrzejewski* (62/3)
 MSPB review of OPM regulation: *Horner v. Andrzejewski* (62/3)
 Employee on detail: Clark (44/27)

GOVERNMENT PROPERTY, MISUSE OF

MSPB upheld a 30-day suspension for an appellant who made several airline trips using frequent flyer miles earned on Government travel: Lewin (119/14)
 Willful misuse presupposes appellant had actual knowledge that use of the GOV constituted unofficial use: *Kimm v Treasury* (111/6)
 When employee using a rented car can't be charged with misuse of government vehicle: *Chufu v Interior* (107/10)
 Misuse for unofficial purpose: Gotshall (74/55)
 Willful misuse: Soroko (62/39)

GOVERNMENTWIDE REGULATION--§§ 7117(a)(1) and 7116(a)(7). See also MGB No. 16 (pages 28 - 31), MGB No. 22 (pages 1 - 3), and **APPLICABLE LAWS.**

See **CONTRACTING OUT** re OMB Circular A-76 being a Governmentwide regulation.
 Governmentwide regulations issued during the term of the agreement become controlling when the agreement renews itself: 37 F 104 (82/24). But see 40 F 57 (85/5).
 Paraphrased regulations pass E-I test: 40 F 60, #6 (85/11)
 Drug testing in accordance with regulations is an appropriate arrangement: 38 F 89 (83/6)
 Excessive interference & G-wide regulations: 29 F 40 (68/12) ... affirmed in *OPM v. FLRA* (75/7)
 FPM 335: *AFGE 2782 v. FLRA*, affirming 7 F 3: (60/3)
 FPM 511, Subchap. 4-3.b, requiring accurate position descriptions: 9 F 20 (27/8)
 Within-grade requirements of CFR 531.407(c)(1)(i): 3 F 119 (8/3) affirmed in *NTEU v. FLRA*, 691 F2d 553 (10/12/82). NR.
 GSA's parking FPMRs: 3 F 118 (8/12)

GROOMING STANDARDS. Also see **ATTIRE AND APPEARANCE.**

Means of performing work: 8 F 75 (25/8). Cf. 26 F 62, #10 (NR).

GROUND RULES. Also see MGB No. 18.

Overriding exigency for management to act: 3-CA-2909, SSA, 1/13/82 and 4-CA-856, SSA, 12/28/81 (23/3)
 Supervisor on union's bargaining team: 3-CA-2164 (23/16)
 Size of bargaining teams: 3 F 14, affirmed in *AFGE v. FLRA* (17/3)

HANDICAPPED EMPLOYEES

A transitory medical condition is not a handicapping condition: Crew, Trammel (101/16)
 Undue hardship waiver of RIF procedures in selecting incapacitated employees for vacant positions: D'Leo (91/38)
 Recovery after removal for physical inability to perform: Morgan (86/22)
 "Qualified" handicapped employees: Wilber (83/19) ... Cohen (83/21)
 No limitation of "major life activities": Miller (81/24) ... Kelly (83/23)
 Aids testing at a mental retardation agency: *Glover, et al. v. Eastern Nebraska Community Office of Retardation, et al.* (78/16)
 Substance abuse as handicapping condition: McCaffrey, Brinkley, Campbell, Toone, Loveland, Beverly, Hougens (74/33)
 Establishment of framework to review claims of prohibited discrimination: Savage, Clark, Robinson (71/29)
 No "otherwise qualified" individual: *Carter v. Tisch* (68/12)
 Compulsive gambling not a handicapping condition: Rezza (68/28)

Unable to perform essential duties of position: Faulk (64/37)
 Withdrawal of reasonable accommodation: Watson (64/30)
 Proof of handicap: Robertson (56/29)
 Safety considerations: Kulling (56/31)
 Qualified handicapped employee: Anderson (35/14) ... Kulling (56/31)
 Mental handicap: Lehman & Hatcher (57/30) ... Brunda (54/35)
 Known handicap: McGilberry (39/24) ... Noe (48/26) ... Ferguson (52/23)
 Position description as statement of essential functions of job: *Guinn v. Bolger* (46/9)
 Smoking ban not reasonable accommodation: Pletten (45/19)
 Misconduct not caused by handicap: Miller (44/30)
 Emotional disorder: Peru (39/22)
 Physical handicap: Snipes (35/10)
 Mental handicap: Anderson (35/14)

HARMFUL ERROR. Also see MGB No. 29 (pages 12 - 17).

Violation of a statutory procedural requirement not necessarily harmful error: *Diaz v Air Force* (111/5)
 Alleged violation of chain of custody is a procedural error subject to harmful error rule: *Frank v. DOT* (105/9)
 Improper use of crime provision to shorten notice period not a harmful error: Hawkins (87/24)
 Late receipt of medical documentation: Goens (77/25)
 Disqualification of MSPB AJ: Singleton (76/26)
 Alleged failure to provide updated position description: De Sousa (74/30)
 Enforced leave for more than 14 days: *Pittman v. MSPB* (69/11)
 False statements: Williams (68/20)
 Failure to identify definite condition subsequent to termination of indefinite suspension: Brode (68/29)
 Prior service in a temporary limited appointment: Raman (67/18)
 Dual role as proposing and deciding official: Franco (64/33)
 Alleged failure to provide information on rights: Connett (63/32)
 Due process: *Smith v. USPS* (56/5) ... *Darnell v. DOT/FAA* (62/8)
 Representation: *Smith* (56/5) ... *Darnell v. DOT/FAA* (62/8)
 Opportunity to reply: *Darnell v. DOT/FAA* (62/8)
 OPM's emergency furlough regulations: *Horner v. Andrzejewski* (62/3)
 Reinstitution of charges: Rose (63/34) ... *Dominguez v. Air Force* (60/7)
 Enforced leave pending inquiry: Passmore (58/27)
 Shortened notice period: Mack (49/28) ... Wood (50/26) ... *Smith v. USPS* (56/5)
Ex parte communication: *Monroe v. Treasury* (51/17)
 Harmful error standard for arbitrators reviewing § 4303 or § 7512 actions: *Cornelius v. Nutt* (47/3)
 Harmful error to union: *Devine v. Nutt* (32/7), reversed by Sup Crt in *Cornelius v. Nutt* (47/3)
 Alternative harmful error doctrine: *Devine v. White* (30/3). But see *Cornelius v. Nutt* (47/3)
 Applying harmful error standard: *Devine v. Brisco* (36/11)
 Specificity of notice: Bias (36/15)
 Denial of union representation: *Miguel v. Army* (34/11)

HIRE. Also see **SELECT** and **VACANCIES**.

"Hiring" additional staff from within: In a split decision, FLRA interprets a "hiring" proposal as dealing with staffing patterns, adding that it was not defining what the term "hire" means under § 7106(a). 52 F 106 (117/5)
 Adequate number of overhires: 2 F 77 (4/15)
 The probationary period, including summary termination, constitutes an essential element of an agency's right to hire under section 7106(a)(2)(A) of the Statute. 53 F 76 (NR)

HOLIDAYS

Holiday benefits for NAF employees are negotiable: *Fort Shafter v. FLRA* (82/5)
 Decision to change holiday staffing: 15 F 21 (37/3)

HOME ADDRESSES. See **INFORMATION**

HOURS OF WORK. Also see MGB No. 20 and the July 1995 LMR Guidance Bulletin, *Negotiating Flexible and Compressed Work Schedules*.

No contract repudiation in refusing to comply with illegal "hybrid" work schedule provision: 50 F 28 (106/15)
 Restrictions on use of flexitime and/or compressed schedules are negotiable: 52 F 117 (117/5)
 Compressed schedules: no requirement to mediate impasses: 45 F 85 (93/27)
 Cleanup time: 40 F 38, #3 (85/7) ... 40 F 60, #3 (85/11)
 Shift changes or overtime to attend grievance adjustment meetings: 40 F 38, #1 (85/7)
 Consecutive days off & OPM regs: 40 F 60, #1 (85/11)
 Overtime starting time fails E-I test: 40 F 60, #5 (85/11)
 Consecutive days off "whenever possible": 40 F 60, #1 (85/11)
 Beepers and G-wide regulations on standby and on-call status: 39 F 67 (84/5)
Status quo ante and back pay remedies for I&I ULPs: 8 F 111 (26/12) ... *AFGE v. FLRA* ... *MEBA v. FLRA* (62/6) ... 27 F 36 & 41 (65/9). But see 35 F 34 (80/15) and 38 F 60 (83/9)
 AWS: FLRA won't consider § 7106 arguments: 23 F 108 (61/61) ... 27 F 94 (NR), affirmed in *Bureau of Land Mgmt v. FLRA* (76/15)
 Starting and quitting times as § 7106(b)(1) "tours": 1 F 106 (1/11), reversed in 33 F 73 (74/19)
 Changing tours after they've been posted: 31 F 94, #5 (71/24)
 § 7512 doesn't apply to reduction in hours: 30 F 1 (69/17)
 Right to assign work includes right to reduce hours: 30 F 1 (69/17)
 Sunday work selection procedures for the equally qualified: 26 F 63 (65/11)
 Work schedule changes and OPM regulations: 17 F 106 (47/27), modified in 23 F 97 (61/16)
 Office hours & mission of agency: 22 F 92 (59/19)
 Store hours vs. employee hours of work: 16 F 144 (44/11) ... 22 F 92 (59/19)
 Shift assignment procedures: 16 F 54 (42/6) ... 16 F 144 (44/11). Also see 14 F 45 and 14 F 91 (NR)
 Separate tour a permissive subject: 16 F 131 (44/15) ... 16 F 144 (44/11)
 Alternative work schedule (AWS): FSIP adverse impact rulings (41/22)
 Waiver of right to bargain on decision to adjust tour: 10 F 100 (29/14)
 Establishing early and late shifts: 5 F 66 (16/5)

IMPACT & IMPLEMENTATION (I&I) BARGAINING. Also see MGB No. 31 and **MIDTERM BARGAINING**

When *status quo ante* remedy for an I&I ULP would be inconsistent with public safety: *PASS v. FLRA* (107/4)
 Office space demand was outside scope of I&I bargaining. *INS v. FLRA*. (98/7)
 No duty to engage in I&I bargaining because matter already covered by agreement: 47 F 114 (98/12)
 Because of an I&I ULP, FLRA orders the activity to rescind a reorganization and RIF affecting 47 employees and concludes a *status quo ante* remedy won't be disruptive: 38 F 60 (83/9)
Status quo ante and back pay remedies for I&I ULPs: 8 F 111 (26/12) ... *AFGE v. FLRA* ... *MEBA v. FLRA* (62/6) ... 27 F 36 & 41 (65/9). But see 35 F 34 (80/15) and 38 F 60 (83/9)
 I&I proposals must be related to the change in COE: 22 F 53 (58/22); but see *NTEU v. FLRA* (63/3)
 Needless formality in notifying union: *AFLC v. FLRA* (27/6) ... *NTEU v. FLRA* (63/13)
De minimis standards: 19 F 10 (49/15), modified in 24 F 42 (62/21).
 EEO settlement agreement giving rise to I&I bargaining: 23 F 6 (59/19)
 I&I duties of gaining & losing employees re inter-unit transfers of employees: 20 F 104 (53/22)
 Maintaining *status quo* when FSIP timely invoked: 18 F 61 (48/18)
 Delaying correction of an unlawful practice: 9 F 65 (28/5)
 Termination of dues of employee temporarily promoted to supervisor: 7 F 54 (24/3)
 Section 7131(a) official time for midterm bargaining: 2 F 31 (3/3) ... *BATF v. FLRA* (24/10)
 Overriding exigency for management to act: 3-CA-2909 & 4-CA-856 (23/3)
 Insubstantial impact standards (superseded by *de minimis* standards): 5 F 45 (15/3) ... 4-CA-888 (22/15) ... 2-CA-862 (22/15)
 Post-impasse implementation requirements: 5 F 52 (15/5)
 Untimely request for FSIP assistance: 5 F 39 (14/11)
 Impact bargaining procedures: 80 FSIP 38 (13/7)
 Implementing agency regulations: 80 FSIP 53 (12/3)
 Midterm bargaining impasse procedures: 2 F 77 (4/5)

IMPASSE PROCEEDINGS. Also see MGB No. 26.

FSIP definition of impasse not applicable in duty-to-bargain ULPs. 54 F 68 (125/13)
 Insisting to impasse that negotiations be tape-recorded is a ULP: 52 F 32 (115/6)
 Six of seven provisions imposed by interest arbitrator are nonnegotiable: 51 F 108 (113/8)
 Interest arbitrator without authority to impose provisions not bargained to impasse: *Commerce v. FLRA* (103/4)
 ... 51 F 108 (113/8)
 No duty to maintain status quo where the matter is nonnegotiable: *INS v. FLRA*. (98/6)
 QCR after FSIP assumes jurisdiction: policy question: 46 F 129 (96/14)
 No duty to mediate compressed work schedules impasses: 45 F 85 (93/27)
 § 7119(b)(1) can't encompass voluntary interest arbitration: 41 F 72 (86/13 & 87/14)
 Voluntary interest arbitration awards: exceptions only: 41 F 1 (86/11)
 New nonnegotiability arguments don't deprive arb of jurisdiction: 41 F 1 (86/11)
 Med-arb by FSIP staff subject to exceptions to awards: 21 F 61 (56/17). But see *DODDS v. FLRA* (77/8) and 37 F 111 (82/21)
 Interest arbitration & excessive interference test: 28 F 114 (67/11). Replaced with the "abrogation" test in 37 F 20 (82/15)
 Agency-head review of interest arbitration provisions: 27 F 72 (66/15) ... reversed in *DODDS v. FLRA* (73/10).
 But see 37 F 111 (82/21) where FLRA abandons earlier position as a result of repeated court reversals.
 § 7114(c) review of interest arbitration provisions: 27 F 72 (66/15), reversed in *DODDS v. FLRA* (73/10) ... *PCC v. FLRA*, reversing 27 F 105 (76/12) ... *Agriculture v. FLRA* on agreed-to FSIP suggestion (77/8) and (80/10) ... *DODDS v. FLRA*, reversing 28 F 115 (77/8) ... FLRA retreats from earlier positions: 37 F 111 (82/21) ... All § 7119(b)(1) interest arbitration is nonvoluntary: 41 F 72 (87/14)
 Interest arbitration & negotiability: 18 F 81, 95 (48/11). But see 37 F 20 re abrogation test (82/15)
 FMCS: No duty to cooperate with FMCS mediation: 3-CA-50435 (57/23). But active FMCS involvement might require maintenance of *status quo* (74/19)
 FLRA stays FSIP order: 32 F 151 (73/19)
 FSIP orders retention of current payday: 87 FSIP 145 (71/27)
 FSIP has authority to order interest arbitration: 31 F 94 & 96 (71/23)
 Interest arbitration and untimely exceptions: 24 F 78 (62/18)
 Maintaining *status quo* when FSIP timely invoked: 18 F 61 (48/18)
 ULP to bargain to impasse on permissive subject: 18 F 92 (48/14)
 FSIP-ordered provisions subject to § 7114(c) review: 15 F 120 (40/3). Cf. 2 F 20-22 (2/11)
 Burden on party proposing to narrow the scope of the NGP: 9 F 92 (27/12)
 Post-impasse implementation requirements: 5 F 52 (15/5)
 Untimely requests for FSIP assistance: 5 F 39 (14/11)
 Binding interest arbitration of wage disputes: 79 FSIP 38 (7/3)
 Negotiability of midterm bargaining impasse procedures: 2 F 77 (4/5)
 Retroactive application of FSIP decisions: 2 F 77 (4/5)
 Midterm implementation of agency regulations: 80 FSIP 53 (3/3)

INCENTIVE PAY AND PERFORMANCE AWARDS. Also see **PERFORMANCE.**

Mandatory performance awards no longer inconsistent with OPM regs: 52 F 117 (117/5)
 Mandating awards and amounts for performance: 37 F 79 (82/26) ... 38 F 46, ##11 & 12 (85/14)
 43 F 3 (88/5)
 Grievability of denied performance award: 37 F 88 (82/26)
 Award ordering a higher award sustained by FLRA: 37 F 101 (82/26)
 Incentive pay rates: 14 F 77 (39/14), reversed in *NTEU v. FLRA* (58/3) and adopted by FLRA in 27 F 25 & 61 (65/7)
 Union observer on incentive awards committee: 19 F 86 (50/18), reversed in *NFFE 1430 v. FLRA* (62/12), and adopted by FLRA in 24 F 86 (62/12). See also 28 F 152 (#9), 29 F 36 and 29 F 90 (NR).
 Linkage between performance and incentive awards: 81 FSIP 7a (15/13)
 Suggestion award formula: 14 F 84 (39/10)
 Performance standards for incentive pay: 14 F 77 (39/14)
 Job elements for incentive pay: 14 F 77 (39/14)
 Distribution of incentive opportunities: 14 F 77 (39/14)
 Termination of incentive pay system: 14 F 77 (39/14)
 Informing employees of tasks that qualify for incentive pay: 14 F 77 (39/14)

INDIVIDUAL RIGHT OF ACTION APPEAL. See **WHISTLEBLOWING.**

INFORMATION, NECESSARY AND RELEVANT--§ 7114(b)(4)

DC Circuit affirms FLRA's application of the court-established "particularized need" test: *AFGE v. FLRA* and *INS v. FLRA*: (122/4)

DC Circuit affirms 51 F 59 where FLRA found a particularized need for a copy of the disciplinary letter issued to a supervisor, which wasn't outweighed by countervailing interests: *Scott AFB v. FLRA* (116/3)

When performance award data isn't protected by Privacy Act: 51 F 87 (112/7)

Refusal to provide copy of settlement agreement of a particular employee: 51 F 52 (111/12)

Particularized need for employee memos requesting reassignment to specialized units: 51 F 68 (111/7)

Nondisclosable unsanitized information: list of award recipients (51 F 7); promotion appraisals (51 F 8); periodic performance reviews (51 F 9); EEO settlement agreement (51 F 12); performance ratings (51 F 16); and OPM ratings (51 F 19): (109/10)

New analytical approach involving "particularized need" and "countervailing interests": 50 F 86; 51 F 26 (109/7)

Routine use exceptions to Privacy Act: 51 F 24; 51 F 26; 51 F 30 (109/4)

No ULP to refuse to provide names of employees receiving outstanding performance ratings: 50 F 67 (108/8)

No ULP when union was provided a sanitized candidate referral roster: 50 F 66 (108/7)

Disclosure of unsanitized performance ratings prohibited by Privacy Act: 50 F 55 (107/13)

Court questions "necessity" for information on functioning of Inspector General: DOJ v. FLRA (105/6)

Discipline of supervisor, tied to workplace safety, is grievable and disclosable under "routine use" exception to Privacy Act: *Scott AFB v. FLRA* (116/3)

Supreme court holds that home addresses can't be obtained under the FOIA exception to the Privacy Act: *DOD v. FLRA* (101/4)

Authority adopts DC Circuit's "particularized need" test: 48 F 127 (101/12)

Requirement that information be "reasonably available" must be independently evaluated: *INS v. FLRA* (97/3)

"Necessity" balancing test requires consideration of countervailing interests: *Scott AFB v. FLRA* (90/6) ... *Prisons v. FLRA*, *HUD v. FLRA* (96/3) ... adopted by 5th Circuit in *INS v. FLRA* (97/3)

"Necessary" information is information that is "adequate": *INS v. FLRA* (97/3)

Letter of proposed discipline meets "particularized need"/"countervailing interests" requirements: 47 F 64 (97/14)

"Particularized need" required where anti-disclosure interest exists: *NLRB v. FLRA*, *Sacramento Air Logistics v. FLRA*, *Park Service v. FLRA* (89/8) ... *Prisons v. FLRA*, *HUD v. FLRA* (96/3)

FLRA defers to OPM's interpretation of its routine use statement: 46 F 22 (94/15)

Disclosure of performance ratings violates Privacy Act: *FLRA v. Commerce* (91/14)

Public has an FOIA interest in promotion practices: 43 F 18 (88/7)

Free transcript of arbitration hearing: 41 F 86 (87/10)

Internal recommendations of management officials: 26 F 13 & 53 (64/20), set aside by D.C. Cir. in *NLRB Local 6 v. FLRA* and *Police Assn. v. FLRA* (72/8), resulting in change in FLRA's position in 38 F 48, 82, & 86 (83/12).

Barring disciplinary use of unreleasable information: 31 F 94, #8 (71/24)

Witness statements: 26 F 4 (64/19)

Transcripts/tapes of statements given during investigation: 26 F 109 (64/19)

Duty to reply to union requests: 26 F 41 (64/21)

On proceedings outside purview of 5 U.S.C. 71: 7-CA-1053 & 7-CA-1175 (23/15). But see 23 F 6 (59/17).

Unclear information requests: 21 F 35 (56/20)

Information under § 7114(b)(4) to be provided free of charge: 10 F 78 (29/12)

Witnesses aren't "data": 7 F 23 (21/7)

Work studies data and performance standards: 7 F 34 (21/13)

Contracting out information: 6 F 24 (17/15)

Information on discharges (court reversal of 17 F 92): *AFGE 1345 v. FLRA* (58/6) ... 25 F 89 (NR) ... 32 F 8 (NR)

Supreme court holds that home addresses can't be obtained under the FOIA exception to the Privacy Act: *DOD v. FLRA* (101/4)

FLRA turned down agency exceptions to an award in which the arbitrator held that IRS had to disclose over 100,000 home addresses to NTEU under the routine use exception to the Privacy Act: 51 F 30 (109/5)

Decisions of appellate courts on disclosure of home addresses: 2nd Cir. in *AFGE v. FLRA* (55/3) ... 4th Cir. in *SSA v. FLRA* (69/3) ... 8th Cir. in *DMA v. FLRA* (69/3) ... D.C. Cir. in *FLRA v. Treasury* (78/5) ... 1st Cir. in *FLRA v. Navy* (87/7) ... 3rd Cir. in *FLRA v. Navy* (87/7) ... 4th Cir. in *Commerce v. FLRA* (89/4) ... 2nd Cir. in *FLRA v. DVA* (90/5) ... 9th Cir. in *FLRA v. Navy* (90/5) ... 7th Cir. in *FLRA v. Navy* (93/6) ... 5th Cir. in *FLRA v. DOD* (93/6) ... 10th Cir. in *FLRA v. DOD, DVA, AF, Interior, and FAA* (96/8)

INSUBORDINATION

Insubordination and failure to follow supervisory instructions are *separate* charges with different standards of proof: Hamilton (115/12)

An employee is not at liberty to disobey an order that may be improper unless . . . : Cooke (107/21)

No insubordination if disobeyed order was improper: Fleckenstein (105/27)

Failure to obey proper order: Stephens (70/37)

INTERIM RELIEF

When interim relief is ordered, agency's failure to timely pay appellant cannot be excused: Moore (124/18)

MSPB lacks authority to consider compensatory damages based on claims that an agency's grant of interim relief is discriminatory: (121/16)

The Board may not second guess an agency's "undue disruption" determination when the agency provides interim relief: Costin (117/19)

MSPB will no longer dismiss an agency's petition for review as moot where the agency has in good faith inadvertently exceeded the requirements of an interim relief order: (116/19)

Absent a disruption determination, interim relief must be to former position and duties: Johnson (108/12)

Agency may not make its offer of interim relief conditional: Abbott and Bush (107/25)

MSPB may not review an agency's "unduly disruptive" determination: King v. Jerome & MSPB (106/7)

Compliance with an erroneous order of interim relief: Edwards (104/32)

Interim relief ends with date of MSPB's final decision: McLaughlin (104/29)

Temporarily repromotion and detail to another geographical area as interim relief. Rogers (102/24)

Interim relief determinations need not take a particular form: Storm (103/23)

When errors in interim relief compliance can be corrected: Avant (102/19)

Appellant can waive interim relief: Smith (101/30)

Conditions for placing prevailing party on administrative leave: *Delaughter, Jr. v. USPS* (100/5)

Several AJ errors addressed by MSPB: Beardsley (95/24)

Interim relief not appropriate when appealed penalty has been served by the time MSPB mitigates the penalty: McIntire (95/16)

No duty to pay overtime as a general rule: McLaughlin (94/16)

Good faith efforts not enough: evidence of full relief necessary: Mascarenas (93/34)

Agency responses to an AJ's order to provide interim relief: Ginocchi (91/35)

Proof of interim relief compliance and petition for review: Brown (90/28)

INTEREST ARBITRATION. See IMPASSE PROCEEDINGS

INTERNAL SECURITY PRACTICES--§ 7106(a)(1)

Wearing body armor over uniform shirt a negotiable appropriate arrangement: *INS v. FLRA*, (101/8)

Consumption of food and drink in computer rooms: *NTEU v. FLRA* (100/3)

Excessive interference re food & drink in computer rooms: *NTEU v. FLRA* (100/3)

Laws and regulations interfere with ISP right: 38 F 89 (83/6)

Suspension of driving privileges: *AFGE v. FLRA* (63/10)

Court remands 8 F 27, re employees not answering questions in an investigation, to FLRA to reconcile with 8 F 75: *IRS v. FLRA* (31/14)

Unrestricted union right to maintain recordings and transcriptions is NN: 8 F 75 (25/8)

Statements under oath: 8 F 75 (25/8)

Visible display of ID cards: 2 F 109 (5/9)

Drug testing: See **DRUG TESTING**

INTERNAL UNION BUSINESS

Supervisors can vote in union elections if members: *AFGE v. FLRA* (69/9)
 § 7131(b) and union financial reports: 2 F 1 (1/19)

INVESTIGATIONS. Also see **WEINGARTEN RIGHTS** and MGB Nos. 1 and 30 (pp. 6 & 7).

Investigation deadlines contra light to discipline: *NFFE 615 v. FLRA* (60/5). But see 38 F 21 on the abrogation test (82/15)
 Failure to cooperate: *Weston v. HUD* (34/9)
 Court remands 8 F 27 to FLRA to reconcile with 8 F 75: *IRS v. FLRA* (31/14)
 Union presence before information on another employee is given: 8 F 75 (25/8)
 Written notice of right to representation: 8 F 75 (25/8)
 Unrestricted union right to recordings/transcriptions is NN: 8 F 75 (25/8)
 Representation before giving written statements: 8 F 75 (25/8)

JUDICIAL REVIEW

The 9th Circuit says it lacks jurisdiction to review a FLRA decision on exceptions to an arbitration award where the award does not involve a ULP: *NTEU v. FLRA* (118/4)
 D.C. Cir. no *Kyne* exception to FLRA's AR decision: *Prisons v. FLRA* (95/3).
 3rd Cir. can't review FLRA's AR decision: *Phil Metal Trades v. FLRA* (91/18)
 Board must consider OPM reconsideration requests: *Hammond* (88/35)
 FLRA remedies for ULPs: *NTEU v. FLRA (en banc)* (82/7)
 Challenge to validity of performance standards: *Wallace v. Air Force* (81/11)
 Damages against individual Federal employees, special factors precluding Federal employees and applicants from seeking: *Spagnola v. Mathis, OMB, et al.* and *Hubbard v. EPA Administrator, et al.* (78/18)
 "Bivens" type suits: *Volk v. Hobson, et al.* (77/20)
 Proper respondent during appeals from MSPB decisions: *Hagmeyer v. Treasury* (76/17)
 MSPB's authority to interpret labor agreement on appellant matters: *Horner v. Schuck et al.*, and *Horner v. James, et al.* (74/14)
 OPM's authority to seek judicial review of MSPB decision: *Horner v. Schuck et al.*, and *Horner v. James, et al.* (74/14)
 No right to judicial review for nonpreference eligible excepted service employee: *Harrison v. Bowen* (67/9)
 Judicial review when statutory ULP implicated in AR decision: *NTEU v. FLRA* (66/3)
 Judicial review when ULP implicated in AR decision: *NTEU v. FLRA* (66/3)
 No independent union standing to seek judicial review of MSPB decision: *Reid v. Commerce* (57/6)
 Frivolous appeal: *Moir v. Treasury* (45/7)
 Proper party respondent: *Peterson v. Energy, Manion v. MSPB* (39/9)
 Exceptions to arbitration awards: *Marshals Service v. FLRA* (33/19) ... Also see MGB # 38, *Exceptions to Arbitration Awards* (1992)
 10th Cir. no *Kyne* exception to FLRA's AR decision: *Interior v. FLRA*, No. 92-9503 (7/27/93), (NR)

JURISDICTION

MSPB had jurisdiction to review a 23-day suspension, even though it was based on an arbitral finding that a 30-day suspension was the minimum statutory penalty: *Westbrook* (123/18)
 Rescission of formal proposal notice doesn't necessarily render moot a claim of whistleblower reprisal: *Kagel* (123/4)
 Court affirms FLRA determinations that it had no jurisdiction under § 7116(d) over matters earlier appealed to MSPB: *Wildberger v. FLRA* (122/4)
 Court holds that MSPB was correct in concluding that, in view of the scope of the negotiated grievance procedure, it had no jurisdiction to hear a refusal to reinstate appeal. *Dunkleberger v. MSPB*: (122/7)
 Court affirms FLRA determinations that it had no jurisdiction under § 7116(d) over matters earlier appealed to MSPB: *Wildberger v. FLRA* (122/4)
 MSPB lacks authority to consider compensatory damages based on claims that an agency's grant of interim relief is discriminatory: (121/16)
 Record not adequate to determine whether the President's directive to bargain on (b)(1) matters can be enforced through FLRA's ULP and subsequent court proceedings: 53 F 70 (121/5)
 General Counsel decision not to issue a ULP complaint isn't judicially reviewable. *PATCO v. FLRA* (121/4)
 Appealing, after retiring before the effective date, a final decision to remove: *Robinson* (118/24)
 MSPB has no jurisdiction where appellant voluntarily accepts lower-graded position after receiving notification of

a RIF separation but before the effective date of the action: *Owen* (118/18)

MSPB retains jurisdiction over a removal appeal, regardless of the effective date of the appellant's retirement: *Cooper v. Navy* (118/8)

The 9th Circuit says it lacks jurisdiction to review a FLRA decision on exceptions to an arbitration award where the award does not involve a ULP: *NTEU v. FLRA* (118/4)

Where an agency rescinds an appealable action, the matter is not moot if there is a remaining claim for compensatory damages based on alleged discrimination: *Currier* (118/27)

FSIP jurisdiction where agency doesn't elect to bargain on § 7106(b)(1) matters: 95 FSIP 1 (112/5) . . . Compare with 97 FSIP 88 (NR) and see questions raised in 53 F 70 (121/5). Also see 18 F 92 (48/14) (ULP to bargain to impasse on permissive subject) and 15 F 65 (NR) (not a ULP to refuse to cooperate with FSIP decision imposing a 7106(b)(1) matter).

Conditions under which the facts underlying a ULP charge can also be adjudicated by MSPB as a whistleblower issue under 5 USC 2302(b)(9): *Mitchell* (111/14)

Can't combine two 14-day suspensions involving separate events to determine jurisdiction: *Jennings v. MSPB* (109/3)

Issue of "implied repeal" when a general legislative change is made to a statute from which there have been various exceptions by statute ... appeal rights of some nonpreference excepted service employees: *Tod v DOD* (108/5)

Disclosures to co-workers may be protected whistleblowing activity: *Sirgo* (107/32)

OPM's RIF regulations do not grant MSPB jurisdiction over assignments effected in lieu of a RIF: *Smitka* (107/24)

Nonpreference excepted service: prior temporary service not creditable towards 2-year requirement: *Forest v. MSPB* (107/9)

Circumstances under which MSPB can enforce compliance with a final order involving an action over which it would not otherwise have jurisdiction: *Spaulding* (105/26)

MSPB has jurisdiction over some nonpreference eligible employees (Briggs), but not over others (Todd) (104/25)

Fed. Cir. has no jurisdiction to review an OPM request for review of an MSPB decision where the issue is the interpretation of a law, rule, or regulation relating to discrimination: *King v Lynch & MSPB* (104/10)

MSPB has no jurisdiction to hear RIF appeal of non-preference eligible employee: *Marcoux* (104/15)

MSPB can't consider whistleblower reprisal allegations if the acts involve security clearance issues. *Wilson* (104/17)

MSPB has no jurisdiction to hear appeal of probationary period termination from supervisory position: *Hardy v. MSPB* (102/13)

District court says it lacks jurisdiction to consider challenges to FLRA's decisions on exceptions to arbitration awards: *NAGE v. Jean McKee, et al.* (98/9)

Leedom v. Kyne appeal of FLRA AR decisions: *Prisons v. FLRA* (95/3). See also *Interior v. FLRA*, No. 92-9503 (10th Cir. 7/27/93) (NR) and *NAGE v. Jean McKee, et al.* (98/9)

No MSPB jurisdiction to review reduction in grade during probationary period: *Edmond* (98/28)

GAO won't take jurisdiction over matters covered by the NGP: *Matter of Riggs, et al.* (91/19)

When reclassification reduction in grade & pay isn't an adverse action: *Broderick* (90/30)

Mere allegation of constructive removal: *Matter of Stephens* (90/25)

Treatment of "on-call" employees: *Wik* (80/29)

Settlement divests Board of jurisdiction: *Gosa* (80/21)

Removal of temporary employee based on performance: *Meade* (80/26)

Board jurisdiction to accept settlement into record: *Shaw* (75/15)

Security clearance revocation: *Egan* (48/20) ... *Navy v. Egan* (70/3) ... *Van Duzer* (74/43)

Voluntary actions: *Gaudette and Cinquegrana* (63/25) ... *Burgess v. MSPB* (46/3) ... *Schultz v. Navy* (63/8) ... *Gaudette and Cinquegrana* (73/17) ... *Barthel* (74/40)

Unified penalty: *Welch* (74/59)

Review of credential's action: *Siegert* (74/28)

Mixed cases: *Wallace v. MSPB* (38/7) ... *Gubisch, Davis, Evcic, O'Neal* (73/27)

Waiver of appeal rights: *Ferby and Jackson* (45/14) ... *McCall v. USPS* (71/15)

Reemployed annuitant adverse action procedures and appeal rights: *Spiegel* (69/22)

Reduction-in-grade and pay based on administrative error: *White* (64/24)

Adverse action procedural arbitrability awards: 23 F 102 (62/27)

Within-grade denial covered by NGP: *Espenschied v. MSPB* (61/3)

Enforced leave: *Thomas v. GSA* (47/20) ... *Passmore* (58/29)

Temporary limited appointments: *Fish* (54/20)

Illegal VRA appointment: *Collaso v. MSPB* (52/5)

Acceptance of petition for review: *Connally v. Justice* (50/7)

Special Counsel's authority to investigate: Russell (50/24)
 Employee standards of conduct violations: Russell (50/24)
 Mixed case after final agency decision: *Spears v. MSPB* (49/5)
 Probationary termination: *Stokes v. FAA* (47/16)
 Mandatory retirement: Ryan (47/33)
 Status as employee: *McCarley v. MSPB* (46/8)
 Cancellation of action: Ferguson (43/22)
 Qualification requirements: Santaloci (38/12) ... Currie (39/31)
 Reassignment/demotion: Arthur Brown (37/19)
 Classification of action: Gibson (36/16)
 TAPER employees: Carter (35/9)
 Attorney fee denial: Hopkins (34/12)
 Noncompliance with adverse action awards: 22 F 20 (57/13)

LACHES

Enforcement of initial decision: Wooten (38/22)

LAST CHANCE AGREEMENTS (LCA). Also see SETTLEMENT AGREEMENT.

Alcoholic employee's acceptance of a "last chance" settlement agreement at time of the proposal was voluntary: Merriweather (105/21)
 When a second removal for breach of a "last chance" settlement agreement is not barred by *res judicata*: Silva (101/33)
Douglas analysis doesn't extend to decision to offer or not offer a last chance agreement: Burrell (99/26)
 Notice of appeal rights when there is an alleged breach of an LCA: *Clark v. USPS* (97/12)
 Last chance agreement as a reasonable accommodation: *Golson-EL v. Runyon* (97/10)
 LCA waiver of appeal rights deprives MSPB of jurisdiction over whistleblowing claim: Byrd (97/23)
 Proposal prohibiting waiver of statutory appeal rights is negotiable: 38 F 34 (83/15) ... enforced by DC Cir in *AFLC v. FLRA* (88/3)
 Removal for violating one section of LCA: *Girani v. FAA* (84/3)
 EEO appeal rights: Royal (83/17)

LAYOFF--§ 7106(a)(2)(A). Also see FURLOUGH

Administrative leave during seasonal curtailments: *Naval Underwater v. FLRA* (73/8), reversing 29 F 47.
 Continuous vs. discontinuous furloughs: 22 F 29 (59/21) ... affirmed in *OPM v. FLRA* (68/3)
 Seasonal employees: Schmidt (34/15) ... *NTEU v. MSPB* (43/10)
 Absolute employment security contra right to layoff: 10 F 1 (28/12)

LEAVE. Also see MGB No. 20 (pp. v & vi).

Generally

Religious comp leave for death in immediate family not inconsistent with 5 CFR 505.1002(b): 52 F 117 (117/5)
 Agency action based on failure to follow established leave procedures: Wilkinson (109/15)
 Leave for NAF employees: *Fort Shafter v. FLRA* (82/5)
 Abrogation test and leave restrictions: 37 F 70 and 106 (82/15)
 Mandating approval of leave requests is NN: 19 F 6 (48/10)

Administrative leave

Administrative leave for functions unrelated to work is a COE: 40 F 38, #2 (85/7)
 Granting extended administrative leave as part of settlement: Miller (82/38)
 For curtailment of operations: *Naval Underwater Systems v. FLRA* (73/8)
 When agency operations are curtailed: 7 F 53 (22/11) ... 24 F 6 (61/9)
 For attending legal education courses: 6 F 97 (19/11)

Annual leave

An agency may not *automatically* deny annual leave to an employee who must serve a jail sentence: Benally (115/10)

No compelling need for regulations mandating A/L for partial shutdown: 24 F 6 (61/9)

Relinquishing discretion to determine when A/L is to be taken: 7 F 53 (22/11)

Approved leave

Basis for adverse action: Cook (43/15) ... Richards (43/34) ... Fleming (59/30)

AWOL

FLRA will apply MSPB's Atchley (83/27) approach in discipline cases in which an employee not following sick leave procedures is charged with, and disciplined for, AWOL: 41 F 60 (87/17)

Removal for AWOL improper where grievant is improperly denied S/L: 41 F 60 (87/17)

Acceptable evidence: Atchley (83/27)

AWOL in lieu of S/L for no medical documentation isn't a constructive suspension: Bucci (72/24)

Failure to request leave after on-the-job injury: *Salazar v. U.S.* (52/6)

Abrogation test passed by a provision under which tardy employees can't be charged AWOL: 38 F 3 (82/15)

Consideration of evidence before leave denial: Foster (35/12)

Enforced leave

LWOP as a constructive indefinite suspension: Pledger (88/29)

Using § 752 procedures: Wilson (84/29)

Indefinite constructive suspension: Barnes (84/18)

Indefinite disabling condition: Bivens (81/26)

Employee declined to return to work: Finn (76/22)

Appealable suspensions: *Pittman v. MSPB* (69/11) MSPB (69/11)

Not appealable suspension: Pittman (64/26)

Pending inquiry: Passmore (58/29)

Mental condition: *Thomas v. GSA* (47/20)

Indefinite period of mental disability: Tigner-Keir (39/30)

Pending disability retirement application: Thomas (37/17)

"Ready, willing, and able." Thomas (37/17)

Family and Medical Leave Act

An agency must prove its compliance with FMLA when making a leave-related charge against an employee. Jefferies (125/16)

Use of leave under the FMLA doesn't preclude the agency from charging excessive absence: Cole (123/15)

Requesting leave under the *Family and Medical Leave Act* of 1993: Ellshoff (122/17)

Denying, during a furlough, approved leave under the *Family and Medical Leave Act* of 1993: Gross (122/14)

FMLA doesn't augment employee's leave balance, but only entitles employee to approved absence in which the employee can substitute accrued paid leave(annual or sick leave): Crutchfield (119/19)

LWOP

It is not improper for an agency to deny leave without pay (LWOP) when there is no foreseeable end to the employee's absence and the employee's absence is a burden to the agency: Bologna (118/20)

Change from LWOP to AWOL: Johnson (84/18)

LWOP may not be denied when absence is due to OJT injury: Murray (80/27)

Change of leave status to AWOL: Cresson (67/14)

Agency discretion: Lehnerd (50/31)

Status while on worker's compensation: McGilberry (39/24) ... Stith, Crawford (40/24)

Sick Leave

Circumstances under which the charge of excessive absence may be appropriate: *Allen* (122/15)
 FLRA will apply MSPB's *Atchley* (83/27) approach in discipline cases in which an employee not following sick leave procedures is charged with, and disciplined for, AWOL: 41 F 60 (87/17)
 Removal for AWOL improper where grievant is improperly denied S/L: 41 F 60 (87/17)
 Circumstances under which S/L is granted passes E-I test: 40 F 60, #6 (85/11)
 Sick leave for NAF employees is negotiable: *Fort Shafter v. FLRA* (82/5)
 Denial, when proper: *Rison* (43/16) ... *Wade v. Navy* (68/6)
 Sufficiency of evidence: *Bentley* (47/32)

LUNCH AND BREAK PERIODS

Improper to use paid breaks to extend lunch period: 7 F 83 (46/18)

MANAGEMENT OFFICIAL. See UNIT DETERMINATIONS

Summary of FLRA "management official" determinations: (26/15)

MANAGEMENT RIGHTS. See headings for specific § 7106 management rights. Also see MGB Nos. 4, 6, 16 (pp. 11 - 26), and 36 (pp. 12 - 38)

Excessive interference test of negotiability: See **APPROPRIATE ARRANGEMENTS**

Abrogation test and arbitration. See **APPROPRIATE ARRANGEMENTS**

Agencies do not have authority to waive management's rights: 34 F 55 (NR)

An arbitral remedy that interferes with the right to select cannot be sustained where the violated CBA provision does not deal with a § 7106(b) matter: 54 F 7 (124/16)

FLRA, finding that § 2(d) of EO 12871 (Order) does not constitute an election to bargain over § 7106(b)(1) subjects, said that "[q]uestions concerning the Respondent's compliance with the [Order] . . . are properly resolved as a matter involving the internal management of the Executive branch." 54 F 43 (124/10)

Where a union claims that its proposal not only is a § 7106(b)(1) matter but also that it does not interfere with any § 7106(a) management right, FLRA will first determine whether § 7106(a) is violated: 54 F 22 (124/14)

"Acting at all" test of pure procedures: 1 F 102 (1/5) ... 2 F 16 (2/7), affirmed in *Dix-McGuire Exchange v. FLRA* and *AFLC v. FLRA* (18/3) ... 4 F 50 (11/5), affirmed in 675 F.2d 260 (11th Cir. 1982) ... 6 F 98 (19/15), questioned in *NFFE 615 v. FLRA* (60/5) and reversed in *Treasury v. FLRA* (70/10), *Customs v. FLRA* (73/5), *BATF v. FLRA* (74/10) and *IRS v. FLRA* (75/13), but staging a comeback in *Interior v. FLRA* (77/16) ... "Acting at all" doctrine modified: 53 F 47 (120/8)

Proposals delaying exercise of management rights are NN unless the delay is conditioned on completion of bargaining or appellate processes. 53 F 47, ## 7 and 11 (120/8).

Two-prong test applicable to performance rating grievances limited to "applicable laws" and agreement provisions on a § 7106(b) matter: 53 F 21 (119/6)

"Dominant requirement" approach to proposals with nonseverable (a) and (b)(1) requirements ... establishing an organizational subdivision in order to prescribe its staffing is NN: 52 F 78 (116/7)

FLRA approach in addressing proposals involving both 7106(a) and 7106(b)(1) matters: 51 F 36 (110/5)

§ 7106 "applicable laws" include regulations having force and effect of law : 42 F 31, 42 F 92 (88/9)

Supreme Court on § 7106(a)(2) rights: *Treasury v. FLRA* (81/8); but see 38 F 89 (83/6)

Option proposal doesn't interfere with management rights when one of the options doesn't directly interfere with a management right: 2 F 77, #III (4/5), affirmed in *DOD, et al. v. FLRA* (18/3) ... 40 F 38, #1 (85/7)

Requirement to act in accordance with laws and regulations in effect at the time the right is exercised: 9 F 20 (27/8). But see Supreme Court's decision in *Treasury v. FLRA* (81/8), partially accommodated by FLRA in 38 F 89 (83/6)

Disclosure of internal deliberations: 26 F 13 & 53 (64/20), reversed by D.C. Cir. in *NLRB Local 6 v. FLRA* and *Police Assn v. FLRA* (72/8), and modified by FLRA in 38 F 48 (83/12)

AWS Act precludes consideration of § 7106 arguments: 23 F 107 (61/11) ... 27 F 94 (NR), affirmed by 9th Circuit in *Bureau of Land Mgmt v. FLRA* (76/15)

Restating mgmt rights in Govt-wide regulations: 29 F 40 (68/12), affirmed in *OPM v. FLRA* (75/7)

Rehabilitation Act requirements override § 7106 rights: 24 F 19 (61/5)

Conditioning the exercise of one mgmt right on prior exercise of another mgmt right: 9 F 142 (29/1)

Giving independent contractual status to regulations interfering with rights reserved to management: 6 F 105 (20/7)

Right to make determinations includes right to engage in predecisional deliberations: 6 F 105 (20/7). But see **INFORMATION**

"Direct interference" test of mixed procedures: 2 F 77 (4/5) affirmed in *Dix-Guire v. FLRA* and *AFLC v. FLRA* (18/3)

General, nonquantitative requirements

"Good cause" for not promoting repromotion eligible: 6 F 56 (18/12)

"Practical and prudent" standard contra staffing patterns: *Air Force v. FLRA* (36/2), reversing 8 F 116

"Undue opportunity" to gain qualifying experience: 17 F 45 (46/22)

"Will endeavor" proposals: 3 F 76 (9/4)

Maintaining *status quo* while a QCR is pending: *Justice v. FLRA* (36/3), reversing 9 F 36

§ 7106 and scope of bargaining for § 704 employees: 22 F 100 (NR)

MEDIATION. See IMPASSE PROCEEDINGS

MEDICAL ISSUES. Also see REASONABLE ACCOMMODATION

Agency had no authority under 5 CFR 339.301(e)(1) to order a psychiatric exam: Harris (104/28)

Board splits on evaluating conflicting medical opinions on employee's failure to take his medicine: Frye (104/18)

Nonreassignment of employee with medical inability to perform: harmful error or handicap discrimination: Ransom (88/43)

Indefinite suspension pending change in physical status: Barnes (86/20)

Recovery after removal for physical inability to perform: Morgan (86/22)

Removal due to medical inability doesn't violate FECA: Bucci (81/21)

Aids testing at a mental retardation agency: *Glover, et al. v. Eastern Nebraska Community Office of Retardation, et al.* (78/16)

Agency can take action based on disruptive conduct: Murray (78/20)

Decision prior to receipt of medical documentation: Goens (77/25)

Work-related stress: McDowell (76/27)

AWOL in lieu of S/L for no medical documentation isn't a constructive suspension: Bucci (72/24)

Fitness-for-duty examination: Mims (72/30) ... Ramirez (71/42)

Personnel reliability program: Dodson (71/40)

Leave denial, when proper: *Wade v. Navy* (68/6)

Enforced leave: Pittman (64/26)

Probationer's preexisting medical condition: Holloman (60/32)

Medical examination ordered by agency: Abatecola (54/17)

MERGER DOCTRINE

Multiplicity of charges: *Southers v. VA* (66/10)

METHODS and MEANS--§ 7106(b)(1). Also see STAFFING PATTERNS

Helicopters and their pilots deal with staffing patterns and methods and means. 54 F 69 (125/10)

FLRA, finding that § 2(d) of EO 12871 (Order) does not constitute an election to bargain over § 7106(b)(1)

subjects, said that "[q]uestions concerning the Respondent's compliance with the [Order] . . . are properly resolved as a matter involving the internal management of the Executive branch." 54 F 43 (124/10)

Where a union claims that its proposal not only is a § 7106(b)(1) matter but also that it does not interfere with any § 7106(a) management right, FLRA will first determine whether § 7106(a) is violated: 54 F 22 (124/14)

"Dominant requirement" approach to proposals with nonseverable (a) and (b)(1) requirements ... establishing an organizational subdivision in order to prescribe its staffing is NN: 52 F 78 (116/7)

FLRA approach in addressing proposals involving both 7106(a) and 7106(b)(1) matters: 51 F 36 (110/5)

General Counsel asks FLRA for a ruling on the relationship between (b)(1) and (a): (106/18)

General Counsel will issue ULP complaints for refusing to bargain on (b)(1) matters: (106/17)

Court says 7106(b)(1) is an exception to 7106(a): *Montana Air v FLRA* (102/4)

EO 12871 directs bargaining on § 7106(b)(1) matters: (99/4)

Agency's no smoking policy: *HHS v. FLRA* (79/8)

Prison guards' uniforms related to agency's mission: *AFGE v. FLRA* (75/6)

Paycheck distribution: 16 F 88 (42/3), reversed in *Metal Trades v. FLRA* and *AFGE v. FLRA* (53/11) and by FLRA in 25 F 31 (63/21)
 Textbooks, teaching materials, and committees: 19 F 99 (49/13)
 Nameplates: 2 F 30 (2/15) ... 8 F 75 (25/8)
 Use of generic terms "equipment" and "facilities": 7 F 89 (23/7)
 Use of firearms: 4 F 52 (11/13)
 Gun boxes for official weapons: 4 F 25 (10/9)
 Grooming standards: 8 F 85 (25/8) ... 26 F 62 (NR)

MIDTERM BARGAINING. See also **I&I BARGAINING** and MGB No. 34.

A contractual duty to engage in midterm bargaining is negotiable, as the 4th Circuit held only that there was no statutory duty to engage in such bargaining: 52 F 46 (115/3) ... 4th Circuit disagreed in *Energy v. FLRA* (117/3) ... matter currently pending before the Supreme Court
 Third prong of "covered by" test--intent revealed by bargaining history, previous agreements, and established practices: 52 F 2 (114/10)
 Midterm bargaining occurs during term of agreement, not after agreement expires: 51 F 68 (111/7)
 4th Cir. finds a provision requiring midterm bargaining unlawful: *DOE v. FLRA* (117/3)
 ULP to not bargain over a matter previously found negotiable: 52 F 46 (115/3) ... not enforced by the 4th Cir in *Energy v. FLRA* (117/3)
 No duty to bargain on either substance or impact because matter covered by agreement: 48 F 115 (100/9)
 FLRA adopts new approach to determine whether midterm proposals are already covered by the agreement: 47 F 96, 99, and 114 (98/10)
 "Differing and arguable" defense to ULP: *IRS v. FLRA* (91/6) ... *SSA v. FLRA* (93/9)
 "Clear and unmistakable" bargaining waiver rejected by D.C. Cir.: *Marines v. FLRA* (91/3)
 4th Cir. disagrees with D.C. Cir. re union right to initiate midterm bargaining: *SSA v. FLRA* (90/7)
 Union right to initiate midterm bargaining: 17 F 103 (46/15) ... reversed in *NTEU v. FLRA* (63/3) ... followed by FLRA in 29 F 12 (68/10), for which the DC Cir. refuses to hold an *en banc* hearing in *FLRA v. IRS* (71/11)
 Midterm bargaining zipper clauses: 31 F 109 & 111 (71/11)
 Midterm bargaining procedure: 31 F 94, #1 (71/23)

MITIGATION/PENALTY. Also see MGB No. 29 (pages 17 - 22).

Mitigation when deciding official regarded the misconduct to be more serious than it was: Shelly (122/18)
 MSPB need not give deference to the agency where it had not given "substantive consideration" to a lesser penalty than removal: Toth (121/22)
 Proof of financial gain not necessary to show falsification, but its absence may bear on reasonableness of penalty for falsification: Seas (121/154)
 Reasonable penalty when not all of the agency's charges are sustained: Devall (118/21)
 Where aggressive, threatening behavior toward a supervisor occurs, MSPB will consider the egregiousness of the misconduct in evaluating a penalty of removal: Chatman (118/19)
 MSPB will balance the relevant *Douglas* factors to *independently* determine a reasonable penalty when not all the charges are sustained: White (115/13)
 14-day suspension for *de minimis* theft: Skates (113/17)
 Board mitigates removal because of "unusual job tensions, personality problems, and mental impairment": Sublette (110/8)
 Putting a demoted supervisor into a non-supervisory position with least loss of grade and pay: Davis (107/19)
 No MSPB independently determined best penalty for sustained charges: Valdez (104/22)
 The *de minimis* value of stolen property can be a proper mitigation factor: Kirk (101/18)
 Board without authority to mitigate removal where completion of training program is a condition of employment: Radcliffe (98/29)
 Board finds insufficient evidence to support mitigation: Slaughter (96/15)
 Interim relief not appropriate when appealed penalty has been served by the time MSPB mitigates the penalty: McIntire (95/16)
 Several AJ errors addressed by MSPB: Beardsley (95/24)
 When mitigation of theft-based charge is inappropriate: Underwood (91/28)
 Relation of prior agency action to matter being appealed: Lewis (90/39)
 No reinstatement of retiree when demotion mitigated to suspension: Ballentine (77/32)
 Past record: Villela (35/7) ... Delgado (74/57)

Letters of warnings and counsellings as aggravating factors: *Mitchell* (65/17)
 Multiplicity of charges: *Southers v. TVA* (66/10)
 Penalty selection: *Jarvis* (65/22)
 Consistency with table of penalties: *Williams* (63/27)
 MSPB review of penalty: *Beard v. GSA* (62/15)
 Successful rehabilitation as a mitigation factor: *Tactay* (60/37)
 Handicap as mitigatin factor: *Gwynn* (54/22)
De minimis offense: *Hunt and Taylor* (53/27)
 Disparate treatment: *Buggie* (51/30)
 Not all charges sustained: *Hagmeyer v. Treasury* (47/18)
 Mitigation for refusal to accept directed reassignment: *Nalbandian* (45/31)
 Incorrect charge: *Martinez* (41/21)
 Progressive discipline: *Villela* (35/7) ... *Bias* (36/15)

MIXED CASES

Cannot raise issue under NGP to preserve MSPB appeal rights: *Fierro* (76/31)
 MSPB review of arbitration awards: *Robinson, Denson, and Appling* (56/22)
 Time limit for judicial review: *Ballard v. TVA* (51/19)

 MSPB and court jurisdiction: *Spears v. MSPB* (49/5)
 Judicial review: *Wallace* (38/7)

MOONLIGHTING. See DUAL EMPLOYMENT

MSPB PROCEDURES

Bifurcation of charges in adverse action appeals brought under chapter 75 of 5 U.S.C., is not generally appropriate: *Beverly Stein -Verbit* (116/17)
 MSPB process where there's an option to file IRA or regular appeal: *Massimino* (99/28)
 Compliance with interim relief: *Wallace* (86/31)
 Employee makes choice of forum when grievance is filed: *Riggs* (86/14)
 IRA independent of EEO complaint: *Horton* (85/18)
 OPM right to reconsideration: *Newman v. Lynch ... Newman v. Corrado* (82/12)
 Authority to reopen cases: *Anderson, et al.* (82/34)
 MSPB's requirements for specific findings of fact not binding on arbitrators: *Wissman v. SSA* (76/19)
 Disqualification of MSPB AJ: *Singleton* (76/26)
 Enforcement of back pay awards: *Ferry* (63/29)
 Same or similar positions: *Gettings* (82/26)
 Review of OPM regulations: *Horner v. Andrzejewski* (62/3)
 Designation of cases as nonprecedential: *Horner v. Burns, Werts and Clark* (57/3)
Status quo ante: *Mann* (54/29)
 Summary dismissal: *Gonzales v. DLA* (50/3)
 Transcripts: *Gonzales v. DLA* (50/3)
 Credibility determinations: *Jackson v. VA* (49/4)
 Service on parties: *Mitchell* (45/24)
 Appellant's presence at MSPB hearing: *Callahan v. Navy* (43/4)
 Misinformation by presiding official: *McKeithan* (43/22)

NATIONAL PARTNERSHIP COUNCIL. Also see PARTNERSHIPS.

"Labor-Management Partnerships": EO 12871, 10/1/93 (98/4)

NEGOTIABILITY. Also see subject matter of negotiability dispute.

Where a union claims that its proposal not only is a § 7106(b)(1) matter but also that it does not interfere with any § 7106(a) management right, FLRA will first determine whether § 7106(a) is violated: 54 F 22 (124/14)

"Dominant requirement" test applicable to nonseverable proposals establishing requirements involving both § 7106(a) and § 7106(b)(1) matters: 52 F 78 (116/7)

FLRA approach in addressing proposals involving both 7106(a) and 7106(b)(1) matters: 51 F 36 (110/5)

Deciding duty to bargain before negotiability: peculiar circumstances: *INS v. FLRA* (93/11)

New arguments don't deprive arbitrator of jurisdiction: 41 F 1 (86/11)

Supreme Court on "applicable laws": *Treasury v. FLRA* (81/8)

"Vitality affects" test: nonunit impact irrelevant: 33 F 41 (74/22), affirmed in *OPM v. FLRA* & *NRC v. FLRA* (81/3)

Government-wide regulations and management rights: *OPM v. FLRA* (75/7)

Compelling need determinations may only be made in § 7117 proceedings: *FLRA v. Army* (Sup Crt decision) (71/3), agreeing with 4th Cir.'s review of 21 F 100 in *Army Engineers v. FLRA* (47/14), but disagreeing with D.C. Cir.'s review of 12 F 86 (32/5) in *DLA v. FLRA* (45/8)

No elements of compelling-need determinations will be made in ULP proceedings, says FLRA: 32 F 73 (72/13)

Drug-testing executive order has effect of law: 30 F 115 (70/20)

Court criticizes FLRA's severance policy: *AFGE v. FLRA* (63/10), accepted as "law of case" in 26 F 26 (63/11)

Excessive interference test: 21 F 4 (54/11). See **APPROPRIATE ARRANGEMENTS**, for additional cases

NG appeals not mooted by contract expiration: *FLRA v. OPM* (54/9)

§ 7114(c) disapproval needn't be specific: 20 F 65 (51/24), affirmed in *NAGE R4-68 v. FLRA*, No. 85-2282 (4th Cir. Sept. 4, 1986) (NR).

NG appeal doesn't require maintenance of *status quo*: 18 F 83 (48/17)

Nonspecific proposals: 2 F (I 9 (3/1 1) ... 10 F 17 (28/15)

Deciding case on record: *NFFE 1167 v. FLRA* (27/3)

Making NG determinations in ULP proceedings: 4 F 100 (13/3). But not if agency doesn't change COE--see *NLRB v. FLRA*, 834 F.2d 191 (D.C. Cir. 1987) (NR).

Master agreement & local scope of bargaining: 4 F 25 (10/9)

Premature to decide issue: 1 F 117 (9/7)

Appealing untimely agency contract disapproval: 3 F 25 (6/13)

Agencies do not have standing to file NG appeals: 2 F 53 (3/15)

For § 704 prevailing rate employees: see **CONDITIONS OF EMPLOYMENT**

"Acting-at-all" test: See **MANAGEMENT RIGHTS**

NEGOTIATED GRIEVANCE PROCEDURE (NGP). Also see **ARBITRATION** and MGB Nos. 3 & 19 (and Nos. 24, 26, 28, 29 & 37 dealing with various arbitration practices)

Court affirms FLRA determinations that it had no jurisdiction under § 7116(d) over matters earlier appealed to MSPB: *Wildberger v. FLRA* (122/4)

Court holds that MSPB was correct in concluding that, in view of the scope of the negotiated grievance procedure, it had no jurisdiction to hear a refusal to reinstate appeal. *Dunkleberger v. MSPB*: (122/7)

Formal discussion ULP involving an informal NGP step mandated by the CBA: 51 F 109 (113/12)

Laws only incidentally dealing with personnel matters may not be enforced through the NGP: *Customs v. FLRA* (105/4)

Simultaneous filing of NGP grievance and IRA appeal: Laity (103/29)

D.C. Circuit says that alleged violations of A-76 can't be grieved under the NGP: *IRS v. FLRA*, *Justice v. FLRA*, and *Public Debt v. FLRA*. (98/3)

Election of forum: § 7116(d): *AFGE 1411 v. FLRA* (91/16) ... *Commerce v. FLRA* (93/7)

NGP and FLSA claims: *Carter v. U.S.* (78/13), reversed in *Carter v. Gibbs (en banc)* (80/3) ... *Muniz v. U.S.* and others (93/12)

GAO won't take jurisdiction over matters covered by NGP: *Matter of Riggs, et al.* (91/19)

Shift changes or overtime to attend grievance adjustment meetings: 40 F 38, #1 (85/7)

Employee makes choice of forum when grievance is filed: *Riggs* (86/14)

Removal of **temporary employees** is nongrievable: 38 F 110, #3 (84/9)

NEES (nonpreference-eligible excepted service) employees can't use NGP to challenge removals: *HHS v. FLRA* (74/7) ... *Treasury v. FLRA* (76/7), but new law gives them access after 2-year probationary period: 39 F 5, ##16 & 17 (84/9)

Supreme Court on enforceable limitations on management's rights: *Treasury v. FLRA* (81/8), but see 38 F 89 (83/6)

FLSA claims not specifically excluded from NGP: *Beall v. US* (83/4)

OMB Circular A-76 and right to grieve violations of regulations: 10 F 1 (28/12), affirmed in *EEOC v. FLRA* (41/3); Sup Crt refuses to review in *EEOC v. FLRA* (56/3). But see *Treasury v. FLRA* (81/8)

NGP & review of infractions committed while acting supervisor: *Devine v. Levin* (39/6), apparently reversed by *Hess v. IRS* (79/3), where Fed. Cir. said unit status at time one is aggrieved determines access

Only the union may represent grievants: 15 F 154 (41/8), but see *AFGE v. FLRA* re oral reply meeting (75/3)

Adverse action oral reply meeting isn't a formal discussion "grievance": *AFGE v. FLRA* (75/3)

No duty to cooperate with employee's attorney because the employee's response to proposed discipline isn't a grievance: *FAA, South Bend*, 5-CA-80506, 1/31/89 (75/5)

Cannot raise issue under NGP to preserve MSPB appeal: *Fierro* (75/31)

Indebtedness determinations are grievable under the NGP: 22 F 14 (57/15) ... 32 F 105 (73/22)

Discrimination allegations of discharged probationary employees: *NTEU v. FLRA* (72/5)

4th Cir. says violations of OMB Circular can't be grieved/arbitrated: *HHS v. FLRA* (71/5)

Performance standards, appraisals & actions: 7 F 34 (21/13) ... *AFGE 1923 v. FLRA* (65/6) ... 30 F 76 (69/14)

Separations of probationary employees: 4 F 50 (11/5) ... 4 F 51 (11/9) ... 80 FSIP 38 (13/7) ... 8 F 75 (25/8), reversed in *INS v. FLRA* (31/12) ... 25 F 90 (63/14)

Access to NGP by excepted service employees: 25 F 94 (63/12)

Notifying union of grievances not filed by union: 25 F 43 (63/17)

Access to agency grievance procedure on certain matters: 23 F 68 (60/20)

EEO complaints & election of forums: 23 F 60, 78 (60/23)

Early retirement is a matter excluded by law: 18 F 43 (47/23)

Panel finds no demonstrated need for stays: 83 FSIP 102, R. 223 (36/9)

Panel excludes 5 of 10 matters from NGP: 83 FSIP 13, R. 223 (36/7)

NGP a mandatory subject of bargaining: 9 F 92 (27/12) ... *AFGE Locals 225, 1504 & 3273 v. FLRA*, affirming 9 F 93, 94 & 114 (32/2)

ULP to not participate in arbitration proceedings--7 F 23 (21/7), reversed by 10 F 60 (29/9)--and to not cooperate in the selection of the arbitrator: 39 F 42 (NR)

Burden on party seeking to narrow scope of NGP: 9 F 92 (27/12) ... *AFGE Locals 225, 1504 & 3273 v. FLRA*, affirming 9 F 93 94 & 114 (32/2)

Procedures for filling supervisory positions: 81K/25837 (24/8). But see 25 F 36 and 34 F 100.

Ex parte arbitration proceedings: 7 F 23 (21/7) ... 26 F 9 (NR)

Exclusivity of the NGP: 5 F 86 (16/7)

Statutory options can't be augmented by negotiations: 5 F 86 (16/7)

Travel expenses for processing grievances: 80 FSIP 53 (12/3)

Deadlines for responding to grievance: 4 F 50 (11/5)

Misinforming employee about access to NGP: 4 F 5 (10/3)

NGP and expiration of contract: 4 F 5 (10/3)

NGP needn't expressly exclude matters excluded by law: 3 F 48 (7/13)

Scope of NGP for National Guard technicians: 3 F 124 (9/11) ... 7 F 52 (22/8) (these decisions were reversed in 14 F 6)

Updating EO procedures: 2 F 32 (3/7)

Staying grieved personnel actions: See **STAYS OF PERSONNEL ACTIONS**

Supervisory positions, agency regulations, scope of NGP, and grievability: compare 25 F 36 (NR) with 34 F 100

NEXUS

Off-duty use and sale of marijuana: *Hebron* (72/22)

Effect on appellant's subsequent litigation: *Crofoot v. GPO, Loveland v. Air Force, Raymond v. Army* (70/17)

Co-workers' unimpeached testimony supports off-duty conduct: *Taylor* (69/19)

Agency's mission and on-duty conduct: *Facer* (65/20)

Egregious circumstances: *Hayes v. Navy* (35/6) ... *Johnson, Harrison, Jaworski, Abrams, Poe, Honeycutt, Backus, Williams, Franks* (40/10)

Off-duty misconduct: *Allred v. HHS* (59/11) ... *Kruger, Lakeollock* (62/29) ... *Dominguez v. Air Force* (60/7) ... *Graybill v. USPS* (60/10)

On-duty sale of cocaine: *Sanders v. USPS* (60/10)

Presumptive nexus: *Dominguez v. Air Force* (60/7)

Criminal charges based on false workers' compensation claim: *Crofoot v. GPO* (50/9)

Critical nature of position: *Olson* (45/30)

Adverse publicity: *Eilertson* (43/13)

NOTICE PERIOD

Emergency furloughs: *Hastie and Lowe* (42/31) ... *Horner v. Andrzejewski* (62/3)

NUMBERS, TYPES, AND GRADES OF EMPLOYEES OR POSITIONS ASSIGNED TO ANY ORGANIZATIONAL SUBDIVISION, WORK PROJECT, OR TOUR OF DUTY-- 7106(b)(1). See STAFFING PATTERNS

OFF-DUTY MISCONDUCT. See NEXUS

OFFICIAL TIME--§ 7131. Also see **TRAVEL AND PER DIEM** and MGB No. 30 (pages 13 - 19).

DoD Appropriations Act trumps duty to bargain on official time for lobbying. 54 F 38, 39, 62, 63, 70 (125/8)
 Amount and scheduling of official time exempt from § 7106: 52 F 117 (117/5)
 Official time to lobby Congress doesn't violate Hatch Act or 18 USC 1913: 52 F 93 (117/11)
 Official time to lobby Congress on COE is negotiable. 47 F 105 (NR).
 Location of union reps on 100% official time a mandatory subject of bargaining: 49 F 105 (103/20)
 § 7131(d) official time an exception to 7106(a), *AFGE 214 v. FLRA*, footnote 9 (59/5)
 § 7131(d) official time to prepare ULP charges, to provide representation at statutory appeal hearings, and to act as technical adviser at hearings: *INS v. FLRA* (99/9)
 Official time for some union convention activities: 46 F 101 (95/9)
 100% official time & staffing patterns: 19 F 23 (48/6) ... qualified in 21 F 81 (56/15) ... reversed in *AFGE 214 v. FLRA* (59/5) ... 35 F 126 (81/15)
 Arbitrator's jurisdiction for life of contract: 29 F 125 (69/18)
 Eligibility and location within the consolidated unit: 23 F 71 (60/18)
 Straight-time remedy for improper denial of official time: 19 F 104 (50/17)
 No official time for distribution of union health brochures: 19 F 24 (50/22)
 § 7131(d) official time for non-LMR matters: 19 F 99 (49/13)
 § 7131(c) official time: 5-CA-752 (16/16) (23/13), reversed in *AFGE v. FLRA* (44/3)
 Rights of PATCO negotiation team during strike: Fitzgerald (39/18)
 § 7131(d) and official time to represent employees in a different unit: 12 F 140 (32/15)
 § 7131(a) official time: 2 F 31 (3/3) ... *BATF v. FLRA* (24/10)
 § 7131(a) official time entitlement accrues only to unit employees: 7 F 118 (23/13)
 § 7131(a) official time below level of exclusive recognition: 7 F 105 (23/13)
 Performance appraisal system activities: 7 F 34 (21/13)
 Attendance at non-labor relations proceedings: 6-CA-696 (16/15)
 Official time for formal discussions: 2-CA-400 (14/13)
 To prepare comments on proposed changes in working conditions: 80 FSIP 53 (12/3)
 Union-sponsored training & Comp. Gen. decisions: 3 F 128 (9/13)
 § 7131(d) and preparation for negotiations: 3 F 49 (7/11)
 Size of bargaining teams: 3 F 14 (6/9)
 § 7131(d) and financial reports: 2 F 1 (1/19)

ORGANIZATION OF AGENCY--§ 7106(a)(1)

"Dominant requirement" approach to proposals with nonseverable (a) and (b)(1) requirements ... establishing an organizational subdivision in order to prescribe its staffing is NN: 52 F 78 (116/7)
 Management discretion: Sinha (41/14)
 Responsibilities and number of organizational subdivisions: 3 F 117 (9/7)

ORGANIZING EMPLOYEES. See also **FREE SPEECH**

Distribution of "announcement cards": 6 F 97 (19/11)
 No-solicitation rules: 6 F 32 (18/7)

OVERTIME. Also see **PAY** and MGB No. 20 (pp. 12, 13, vi & vii).

Restitutional overtime remedy is deficient because not based on a reconstruction of what the agency would have done had it not violated the CBA's "just cause" standard: 53 F 129 (123/13)
 Arbitrators must apply the remedies of the FLSA for FLSA violations: 53 F 134 (123/10)
 It is improper to deduct paid leave from hours worked in determining FLSA overtime: 53 F 87 (122/9)

Proposal restricting work assignments to the bargaining unit interferes with the right to assign work and, because there was no showing that loss of opportunity for overtime is an adverse effect, isn't an appropriate arrangement: 53 F 22 (119/9)

Defining employees qualified to perform overtime is NN: 46 F 143 (96/13)

Overtime pay for performance of representational functions outside regular duty hours is NN: (96/13)

No duty to pay overtime as a general rule: McLaughlin (94/16)

FLSA: administrative exemptions: 44 F 65 (91/24)

FLSA overtime & postliminary activities: *Air Force v. FLRA* (89/11)

Limiting overtime to 8-hr blocks on Saturdays is an appropriate arrangement: 40 F 60, #4 (85/11)

Overtime starting time fails E-I test: 40 F 60, #5 (85/11)

Shift changes or overtime to attend grievance adjustment meetings: 40 F 38, #1 (85/7)

Beepers permitted only if in pay status is NG: 39 F 67 (84/5)

FSIP orders use of beepers: 90 FSIP 153 (84/5)

Abrogation test and limits on right to assign overtime: 37 F 20 and 103 (82/15)

Guarantee of at least 4 hrs overtime work: 19 F 81 (50/20)

Callback: minimum of 4 hrs overtime pay: 19 F 117 (51/26)

Limiting overtime to unit employees only: 16 F 54 (42/6)

PARTNERSHIPS

FLRA, finding that § 2(d) of EO 12871 (Order) does not constitute an election to bargain over § 7106(b)(1) subjects, said that "[q]uestions concerning the Respondent's compliance with the [Order] . . . are properly resolved as a matter involving the internal management of the Executive branch." 54 F 43 (124/10)

An agreement resulting from negotiations conducted in a "partnership" atmosphere may nonetheless be a statutorily enforceable collective bargaining agreement: 53 F 42 (120/12)

Arbitrator interprets a partnership agreement as not creating an enforceable bargaining obligation: 52 F 118 (120/15)

General Counsel guidance on work groups: (109/13)

General Counsel finds that a partnership council with unrepresented employees isn't a "company union": (108/9)

General Counsel's decisions on union membership on partnership councils (107/17)

Draft OPM guidance for implementing partnerships: 12/16/93 (100/13)

Draft guidance discussed by National Partnership Council: (100/13)

EO 12871, "Labor-Management Partnerships," 10/1/93: (99/4)

PAST PRACTICES

Right of GSA Administrator to terminate practice of carrying firearms home: *GSA v. FLRA* (113/3)

Unilateral termination of an unlawful past practice is a ULP: 49 F 139 (103/17)

A non-COE past practice can't "ripen" into a COE: 27 F 45 (65/12) ... but see *AFGE Locals 2761 & 2614 v. FLRA* (76/14) for exceptions to rule

Staffing pattern waiver via past practice clause: 29 F 46 (68/15)

I&I bargaining may not delay correction of unlawful practice: 9 F 65 (28/5)

PAY, FRINGES AND PAY ADMINISTRATION. Also see INCENTIVE PAY AND AWARDS

Negotiability of pay & fringes:

Pay-setting discretion under 5 USC 5349 not sole & exclusive: *BEP v. FLRA* (113/5)

Pay/benefits proposals NN--Dir. of Office of Thrift Supervision has sole discretion over pay and benefits: *AFGE 3295 v. FLRA* (106/6)

Fort Stewart Schools v. FLRA, 110 S. Ct. 2043 (81/5)

Pre-*Fort Stewart* cases: 12 F 100 (33/16) ... 24 F 41 (62/23) ... *Navy v. FLRA* (70/6) ... *Treasury v. FLRA* (70/6) ... *DODDS v. FLRA* (later mooted) (70/6) ... *West Point v. FLRA* (73/3) ... *NRC v. FLRA and Fort Steward Schools v. FLRA* (74/4) ... *DODDS v. FLRA* (75/10) ... *NRC v. FLRA (en banc)* (77/5) ... *Air Force v. FLRA* (77/5) ... *Fort Knox v. FLRA* (77/5)

Post-*Fort Stewart* cases: *Fort Shafter v. FLRA* (involving NAF employees) (82/5)

Pay and COE for § 704 employees:

Sunday premium pay not a current prevailing practice: *AFGE 1978 v. FLRA* (91/18)
 SOB for § 704 employees not limited to matters bargained before 8/19/72: 41 F 1 (86/11)
 "Specific" pay practices for "grandfathered" § 704/9(b) employees: *Interior v. FLRA* (76/10) and (82/8)
 Sunday premium pay: 36 F 1 (81/13) ... *Interior v. FLRA* (82/8)
 "Pay practices" v. COE for § 704 prevailing rate employees: *USIA v. FLRA* (80/8)
 FSIP-ordered provisions: 79 FSIP 38 (7/3)

Other

Union's vice president had authority to enter into a settlement agreement involving asbestos exposure: 52 F 138 (118/13)
 Gainsharing formula: *Charleston Shipyard v. FLRA* (78/3) ... 41 F 21 (86/9) ... *Army v. FLRA* (94/4) ... *HHS, SSA v. FLRA* (95/5)
 FLSA claims and NGP: *Carter v. Gibbs (en banc)* (80/3) ... *Muniz v. U.S., Albrecht v. Constance Newman, Andreen v. U.S.* (93/12)
 FLRA stays FSIP order because pay issue not settled: 32 F 151 (73/19)
 Payday, FSIP orders retention of current: 87 FSIP 145 (71/27)
 § 7512 doesn't apply to reduction in hours: 30 F 1 (69/17)
 Incentive pay rates and amounts: 27 F 25 & 61 (65/7)
 Misconstrued EDP award isn't enforced: *Navy v. FLRA* (64/4)
 Paycheck distribution: 16 F 38 (42/3), reversed in *Metal Trades v. FLRA* and *AFGE v. FLRA* (63/11)
 Compelling need for agency regulations establishing a uniform pay system: 14 F 84 (39/10), remanded at FLRA's request, reaffirmed in 21 F 36 and reversed by D.C. Circuit in *NTEU v. FLRA*, No. 84-1286, 3/20/87.
 Stranded overnight on offshore drilling platforms: illegal overtime practice: 9 F 65 (28/5)
 Overtime rate of pay: 3 F 85 affirmed in *AFGE v. FLRA* (17/3)
 Work period for purpose of calculating overtime pay: 3 F 66 (9/1)
 Within-grade requirements of 5 CFR 531.407(c)(1): 3 F 119 (8/13) affirmed in *NTEU v. FLRA*, 691 F2d 553 (10/12/82).

PERFORMANCE. Also see **INCENTIVE PAY AND PERFORMANCE AWARDS**, MGB Nos. 7, 10, 23 and 29, and **LABOR RELATIONS CASE LAW ON PERFORMANCE MANAGEMENT**, February 1996.

Arbitral review of performance standards, ratings and actions

Two-prong test applicable to performance rating grievances limited to "applicable laws" and agreement provisions on a § 7106(b) matter: 53 F 21 (119/6)
 Case remanded to require the arbitrator to either rate the grievant or direct the agency to have a different supervisor do the rating. 48 F 112: 48 F 112 (100/11)
 No justification for lowering ratings from previous year: 41 F 25 (86/7)
 Arbitrator's authority to review and remedy: 7 F 34 (21/13) ... 21 F 86 (57/19) ... *Rogers v. DODDS* 65/3) ... 30 F 76 (69/14) ... 30 F 127 (70/28)
 No authority to mitigate Ch. 43 actions: *Homer v. Bell* (66/6)
 Fair & reasonable application of standards: 81 FSIP 36 (16/13)
 No arbitral review of the content of performance standards: 5 F 14 (13/11)

Performance standards and ratings and scope of bargaining

A proposal blocking a 25% increase in the productivity standard doesn't qualify as an appropriate arrangement where the record isn't sufficient to establish an adverse effect: 52 F 48 (115/5)
 Mandatory performance awards no longer inconsistent with OPM regs: 52 F 117 (117/5)
 Giving employees option of QSI or cash award after mgmt decides to grant QSI is NG: 52 F 117 (117/5)
 3 of 7 proposals are NN because they excessively interfere with mgmt rts: *POPA v FLRA* (106/3)
 Sampling methodology to ensure accuracy of sampling is a negotiable procedure: *DVA v. FLRA* (104/5)
 "Untailored" appraisal process doesn't qualify as an "appropriate arrangement": *NLRB v. FLRA* (99/5)

Requiring that ratings take account of all job functions and available time is an appropriate arrangement: 46 F 66 (97/16)

Disclosure of performance ratings violates Privacy Act: *FLRA v. Commerce* (91/14)

Supervisory justification for rejecting employee performance plan suggestions: *Patent Office Professional Assn. v. FLRA* (77/18)

Timing of performance-based adverse actions: *Patent Office Professional Assn. v. FLRA* (77/18)

"Floor" for performance-based demotions: *Patent Office Professional Assn. v. FLRA* (77/18)

Employee right to transfer to another supervisor: *Patent Office Professional Assn. v. FLRA* (77/18)

Publicizing performance plans in Official Gazette: *Patent Office Professional Assn. v. FLRA* (77/18)

Excessive interference and changes in job requirements: *OEA v. FLRA* (77/13)

Performance standard, content of: 3 F 1 19 (8/3) ... 3 F 120 (8/9) ... 5 F 14 (13/1 1) ... 6 F 5 (17/1 1) ... 7 F 34 (21/13) ... 7 F 115, affmd in *NTEU v. FLRA* (50/5) ... 16 F 127 (45/11). But see *Rogers v. DODDS* (65/3)

Incentive awards committee, union observer on: 19 F 86 (50/18), reversed in *NFFE v. FLRA* (62/12), adopted as "law of case" in 24 F 86 (62/12)

Incentive pay: 14 F 77 (39/14), reversed in *NTEU v. FLRA* (58/3)

Rating an employee on how quickly new material is mastered: *SSA v. FLRA* (57/11)

Critical elements: 3 F 119 (8/3) affirmed in *NTEU v. FLRA*, 691 F.2d 553 (10/12/82). NR.... 5 F 14 (13/11) ... 7 F 34 (21/13) ... 7 F 115, affirmed in *NTEU v. FLRA*, 767 F.2d 1315 (8/5/85) (50/5)

Service credit for RIF purposes: 17 F 12 (45/11)

Requiring the standards to be fair and equitable: 16 F 127 (45/11). Cf. *Rogers v. DODDS* (65/3)

"Reasonable" performance elements: 17 F 12 (45/11). But see *Rogers v. DODDS* (65/3)

Within-grades, performance standards for: 3 F 119 (8/3) ... 16 F 127 (45/11) Rating levels, number of: 13 F 96, 13 F 112, 14 F 2 (34/3)

Overall rating, formula for: 13 F 96, 13 F 112, 2 (34/3)

Rating levels, number of: 13 F 96, 13 F 112, 14 F 2 (34/3)

Performance standards for all performance levels: 13 F 49 (33/10)

Noncritical elements, negotiating: 13 F 49 (33/10)

Overriding exigency to implement performance system by 10/1/81. 3-CA-2909 (23/3)

Procedure for counting work: 7 F 35 (22/3)

Standards to be *applied* fairly & equitably: 3 F 120 (8/9) ... 7 F 34 (21/13)

Duration and frequency of rating cycle: 5 F 14 (13/11) ... 7 F 34 (21/13)

Work studies and performance standards: 7 F 34 (21/13)

Making allowances for factors beyond the employee's control: 7 F 34 (21/13)

Work studies data for the union: 7 F 34 (21/13)

Union-management committee to recommend changes: 7 F 34 (21/13)

Official time for performance system activities: 7 F 34 (21/13)

Barring use of information to evaluate performance: 6 F 98 (19/5)

Position descriptions and performance requirements: 6 F 5 (17/11)

Incentive awards, linkage between performance and: 81 FSIP 7(a) (15/13)

Definitions of elements and standards: 3 F 120 (8/9) ... 81 FSIP 7(a) (15/13)

Number of performance ratings: 81 FSIP 7(a) (15/13)

Performance evaluation isn't a *Weingarten* meeting: 5 F 53 (15/9)

Performance ratings for union officials: 40 F 53, 39 F 62, 35 F 94, 34 F 145, 42 F 88 (NR)

In RIF situations

Downgrades: Shillinger (85/25)

Performance ratings affecting RIF retention standing: Haataja and Mazzola (46/28)

Unacceptable performance in general

Provision giving NEES employees right to arbitrate perf-based and adverse actions after only 1 year service is contrary to law: 52 F 117 (117/5)

Removing documentation relating to proposed perf-based removal or demotion (but not denial of within-grades) after one year is NG: 52 F 117 (117/5)

Post OPM approval changes in agency's performance plan: Satlin (102/28)

Appellant's stipulation didn't satisfy the agency's burden of proof re unsatisfactory performance: Stenmark (101/22)

Agency not required to provide formal training during the opportunity period: Corbett (101/32)
 Demonstrating unacceptable performance: Board exceptions: Smallwood (91/33)
 Performance before and after opportunity period: Brown (82/43) ... Sullivan (82/40)
 Failure to provide updated position description: De Sousa (74/30)
 Supervisory probationary period: Steward (73/33)
 Chapter 43 v. Chapter 75: Gende (42/22) ... *Lovshin v. Navy* (47/12) ... Kopp (67/16)
 Removal of excepted service employee under Chapter 432: *Harrison v. Bowen* (67/9)
 Mitigation of agency actions: Buggie (51/30) ... *Horner v. Bell* (66/6)
 Substantial evidence burden: Luscri (66/25)
 Nonnegotiable remedies for unacceptable ratings: *AFGE 1923 v. FLRA* (65/5)
 Details: Shustky (64/22)
 Dual role as proposing and deciding official: Franco (64/33)
 Attorney fees for grievance of performance rating in connection with Ch 43 action: Blumenson (59/28)
 Attorney fees in failure to prove OPM approval of performance plan: Hubbard (59/27)
 Substitution of chapter 75 action for chapter 43 action after adjudication: *Hanratty v. FAA* (59/13)
 Performance on detail: Smith (57/28)
Ex parte communication: Andersen (48/23)
 OPM approval of agency umbrella plan: Evans (46/26)
 Modification of agency action: Lisiecki (42/10)
 OPM plan approval: Griffin (42/13)
 Effect of invalid rating: Tobias (35/15)
 ALJs, cause for action against: Goodman, Brennon, Davis, Manion (34/13)
 Progressive discipline for unacceptable performance: 9 F 142 (29/1)

Performance elements and standards

Absolute standards: permissible in Callaway (42/20) but invalid in Mendez (104/24)
 Assessing validity of performance standards: Smith (86/16)
 Validity of standards: Benton, Blain, Cochran (71/38) ... *Eibel v. Navy* (74/12) ... *Wilson v. HHS* (52/10) ... Alexandria (55/22) ... Walker (50/28)
 Communication of standards for retention: Jiminez-Howe (68/24)
 Arbitrator review of: *Rogers v. DODDS* (65/3)
 Quantitative: Rocheleau (54/32) ... Johnson (64/35) ... Player (64/35)
 Changing performance standards: Mouser (66/23) ... Boggess (59/25)
 Generic: Alexander (55/22)
 Challenge to: Evans (46/26)
 Communication: *Weirauch v. Army* (54/3) ... Cross (44/19)
 Sub-elements: *Adkins v. HUD* (56/10) ... Shuman (42/17)

Opportunity to Improve

Proration of numerical standards: Sullivan (82/40)
 Violation of right to training: Wright (79/18)
 Assistance during: Macijauska (68/22) ... Adorador (74/32)
 Failure to provide: Fairall (64/29)
 Extensions of: Papritz (59/23)
 Shorter than agency requirement: Wood (50/26)
 Marginal performance triggering opportunity period: Colgan (48/30)
 In general: Tobias (35/15) ... Sandland (42/15) ... Cortes (45/27)
 Performance during: Wilson (46/24)

Performance awards: See **INCENTIVE PAY AND PERFORMANCE AWARDS.**

Disclosure of performance related data

When performance award data isn't protected by Privacy Act: 51 F 87 (112/7)
 No ULP to refuse to provide names of employees receiving outstanding performance ratings: 50 F 67 (108/8)
 Disclosure of unsanitized performance ratings prohibited by Privacy Act: 50 F 55 (107/13)

PERMISSIVE SUBJECTS. Also see **CONDITIONS OF EMPLOYMENT, STAFFING PATTERNS** and **METHODS AND MEANS.**

Helicopters and their pilots deal with staffing patterns and methods and means. 54 F 69 (125/10)
 FLRA, finding that § 2(d) of EO 12871 (Order) does not constitute an election to bargain over § 7106(b)(1) subjects, said that "[q]uestions concerning the Respondent's compliance with the [Order] . . . are properly resolved as a matter involving the internal management of the Executive branch." 54 F 43 (124/10)
 Where a union claims that its proposal not only is a § 7106(b)(1) matter but also that it does not interfere with any § 7106(a) management right, FLRA will first determine whether § 7106(a) is violated: 54 F 22 (124/14)
 Record not adequate to determine whether the President's directive to bargain on (b)(1) matters can be enforced through FLRA's ULP and subsequent court proceedings: 53 F 70 (121/5)
 "Dominant requirement" approach to proposals with nonseverable (a) and (b)(1) requirements ... establishing an organizational subdivision in order to prescribe its staffing is NN: 52 F 78 (116/7)
 Management can elect to bargain on working conditions of sups and mgrs: 52 F 65 (116/13)
 FSIP jurisdiction where agency doesn't elect to bargain on § 7106(b)(1) matters: 95 FSIP 1 (112/5) . . .
 Compare with 97 FSIP 88 (NR) and see questions raised in 53 F 70 (121/5). Also see 18 F 92 (48/14) (ULP to bargain to impasse on permissive subject) and 15 F 65 (NR) (not a ULP to refuse to cooperate with FSIP decision imposing a 7106(b)(1) matter).
 FLRA approach in addressing proposals involving both 7106(a) and 7106(b)(1) matters: 51 F 36 (110/5)
 3 F 66, temporarily abandoned in 49 F 102, is reaffirmed: management can elect to bargain on the working conditions of supervisors and managers: 52 F 65 (116/13)
 Proposals directly implicating the working conditions of supervisors are outside the mandatory scope of bargaining: 52 F 80 (116/11)
 "Dominant requirement" approach to proposals with nonseverable (a) and (b)(1) requirements ... establishing an organizational subdivision in order to prescribe its staffing is NN: 52 F 78 (116/7)
 Insisting to impasse that negotiations be tape-recorded (a permissive subject) is a ULP: 52 F 32 (115/6)
 A provision on a permissive subject does not automatically terminate upon expiration of the agreement, but rather only when a party notifies the other that it will no longer be bound by the provision: 51 F 125 (114/13)
 FLRA approach in addressing proposals involving both 7106(a) and 7106(b)(1) matters: 51 F 36 (110/5)
 Including supervisors in "mixed" units is a permissive subject of bargaining: *Bureau of Reclamation v FLRA* (103/8).
 Abrogation test doesn't apply to permissive subjects: 37 F 67 (82/15)
 Starting & quitting times a permissive subject: 33 F 73 (74/19)
 § 7114(c) doesn't apply to agreed-upon permissive subjects: 24 F 7 (61/7)
 ULP to bargain to impasse on permissive subject: 18 F 92 (48/14)
 Separate tour a permissive subject: 16 F 131 (44/15) ... 16 F 144 (44/11)
 Terminating a waiver, a permissive subject of bargaining, after agreement expires: 14 F 89, 15 F 21 (37/3)
 Management can elect not to bargain on COE of non-unit employees: 3 F 66 (9/1)
 Quality circles a permissive subject of bargaining: 29 F 96 @ 1257. (NR)
 Not a ULP to refuse to cooperate with FSIP decision imposing a 7106(b)(1) provision: 15 F 65 (NR)

PERSONNEL BY WHICH AGENCY OPERATIONS SHALL BE CONDUCTED--§ 7106(a)(2)(B)

And crediting plans to measure KSAOs: *Customs v. FLRA* (39/3)

PHYSICAL WORKING CONDITIONS

Office design: *IRS v. FLRA* (33/12), reversing 9 F 73

PICKETING. Also see **STRIKES, SLOWDOWNS, JOB ACTIONS** and **MGB No. 14.**

Conditions under which picketing is prohibited: 22 F 7 (57/17)

POSITION CLASSIFICATION

Downgrades: Shillinger (85/25)
 Desk audits & General Counsel decisions: (31/20). But see 12 F 128 and 15 F 158.
 Procedures to ensure accuracy of position descriptions: 2 F 16 (2/7) ... 6 F 97 (19/1 1) ... 8 F 75 (25/8)

Classification in guise of award on accuracy of position description: 8 F 103 (26/14)
 Working employees out of classification: 7 F 1 (20/16)
 Repromoting FES-downgraded employees on basis of seniority: 3 F 26 (6/15)

POSITION DESCRIPTION

Barring assignment of work unrelated to PD: 19 F 81 (50/20)
 Desk audits: General Counsel decisions (31/20). But see 12 F 128 and 15 F 158.
 Proposals resulting in inaccurate position descriptions: 9 F 20 (27/8)
 Negotiated precharge procedure: 8 F 81 (25/12)
 Changing position description to reflect added unrelated duties: 2 F 16 (2/7)

PREHEARING DISCOVERY

Discovery under MSPB's rules limits union's role: 47 F 11 (96/11)
 Prehearing discovery proposal is negotiable: 41 F 72, #9 (87/14)

PRIVACY. See INFORMATION

PROBATIONARY EMPLOYEES

The employing agency doesn't have to advise a new employee of the implications of a change in position. Park (125/17)
 Actions taken during probationary period based on failure to pass a physical examination do not trigger the pre-employment procedural requirements of 5 CFR section 315.805: Butler (124/19)
 The probationary period, including summary termination, constitutes an essential element of an agency's right to hire under section 7106(a)(2)(A) of the Statute." 53 F 76 (NR)
 Limited probationary appeal rights for employees with term appointments: Joadan (103/22)
 Supervisory probationary period: time served on temporary promotion doesn't count: *Collins v. MSPB* (94/7)
 Appealable action meeting minimum due process requirements will be reversed only if procedural error is harmful: Stephen (86/42)
 Discrimination allegations of discharged probationary employees: *NTEU v. FLRA* (72/5)
 Creditable service. Raman (67/18)
 Probationer can't process discrimination claim through NGP: 25 F 90 (63/14)
 Preexisting medical condition: Holloman (60/32)
 Delivery of termination notice: Cephas (51/31)
 Separations and negotiated grievance procedure: 4 F 50 (11/5) ... 4 F 51 (11/9) 80 FSIP 38 (13/7) ... 8 F 75 (25/8), rejected by court in *INS v. FLRA* (31/2), FLRA reversal of prior decisions in 13 F 109 (34/6)

PROCEDURES, NEGOTIABLE--§ 7106(b)(2))

Sampling methodology to ensure accuracy of sampling is a negotiable procedure: *DVA v. FLRA* (104/5)

PROHIBITED PERSONNEL PRACTICES (PPP)

Proof requirements of alleged violations of 5 U.S.C. § 2302(b)(5): Special Counsel v. Brown (104/33)
 Circumstances under which the use of a temporary limited appointment can be a PPP: Special Counsel (101/27)
 A/L to prepare PFR may be a subject of an IRA appeal: Marren (88/27)
 Intentional false statement not protected: Johnson (86/37)
 Non-renewal of appointment as reprisal for whistleblowing: Kern (86/34)
 IRA is independent of EEO complaint: Horton (85/18)
 Reprisal for filing grievance isn't grounds for IRA: Fisher (85/15)
 Alleged reprisal based on whistleblowing: *Hagmeyer v. Treasury* (47/18) ... Lewis (54/23) ... Berube (57/19) ... *Starrett v. Special Counsel* (60/14) ... Oliver (71/44) ... *Berube v. GSA* (74/16)
 Free speech and whistleblowing, commenting on matters of public concern: *Fiorillo v. Justice* (72/10) ... *Mings v. Justice* (72/10) ... *Stanek v. DOT* (72/10)
 Improperly influencing applicant to withdraw: *Filiberti and Dysthe v. MSPB* (64/9)
 Filing of criminal complaint is not an exercise of appeal right: Ledeaux (54/25)
 Sanctions against retired employee: Special Counsel v. Filiberti and Dysthe (53/24)

Special Counsel complaint/assessment of penalty by Board: Hoban (42/29) ... Harvey (44/14) ... Filiberti and Dysthe (44/17)

PROMOTIONS. Also see **CREDITING PLANS, VACANCIES,** and **SELECTIONS FOR APPOINTMENTS**

No ULP when union was provided a sanitized candidate referral roster: 50 F 66 (108/7)
 Sequential consideration and pressure to select: 38 F 117 (84/11) ... 40 F 38, #6 (85/7)
 Abrogation test and selecting minimally-qualified candidate with priority consideration: 37 F 67 (82/15)
 Selecting most senior of equally-qualified candidates is NN: 35 F 127 (81/16)
 Reclassification of position: Taylor (81/28)
 Adverse action procedures not required to end temporary promotion: Boswell (79/17)
 Sequential consideration: 24 F 54 (62/19) ... *Treasury v. FLRA* (70/10) ... *BATF v. FLRA* (74/10)
 Passive union participation where deliberations are protected: *AFGE 2094 v. FLRA* and *AFGE 2298 v. FLRA* (69/6)
 Union-named member of promotion panel: 19 F 81 (50/20), affirmed in *NFFE v. FLRA* (68/5) ... 28 F 82 (67/13)
 Retroactive temporary promotion where there is no nondiscretionary provision: *AFGE 1923 v. FLRA* (59/7), affirming 17 F 93
 Termination of temporary promotions: *Phipps v. HHS* (48/4)
 Mandating selection of repromotion eligibles contrary to OPM regulations: 7 F 13 (on remand) (37/11)
 § 7106(a) doesn't apply to selection of repromotion eligibles: *AFGE v. FLRA* (31/5)
 Minimum qualifications for temporary promotions: 11 F 7 (30/7)
 Career-ladder: 2 F 8 (2/13) ... 7 F 97 and 98 (23/10). Also see 10 F 32 and cases cited therein.
 Nonselection and protected activity in mixed motive cases: 6 F 23 (17/13)
 Temporary promotions for details to higher grades: 2 F 77 (4/5) affirmed in *Dix-McGuire v. FLRA* and *AFLC v. FLRA* (18/3) ... 4 F 52 (11/13) ... 81 FSIP 17 (16/9)
 Unilateral changes in promotion procedures: 4 F 100 (13/3)
 Coverage of merit promotion article. 80 FSIP 38 (13/7)
 Promotion procedures: 80 FSIP 38 (13/7)
 Using activity's merit promotion plan to fill all vacancies: 6 F 96 (20/3)

PROTECTIVE ORDER

Noncompliance with protective order: burdens of proof: Cloonan (103/31)

QUALIFICATION REQUIREMENTS

MSPB authority to review: Santaloci (38/12) ... Siegert (74/28)
 Bar association membership: Currie (39/21)
 Management determinations: Santaloci (38/12)
 Temporary promotions and minimum qualifications: 11 F 7 (30/7)

REASONABLE ACCOMMODATION. Also see **ALCOHOLISM.**

When there is no requirement that an agency grant leave to enable an alcoholic employee to seek rehabilitation: Walsh (120/20)
 Misconduct involving driving under the influence while on duty constitutes disqualifying behavior that precludes any right to reasonable accommodation: Coates (119/17)
 Firm choice as a form of reasonable accommodation no longer required: Johnson; Kimble (113/18)
 Because severe allergies affected breathing in only one building, employee wasn't "disabled": Groshans (108/10)
 Reasonable accommodation not a promotion merely because the position has promotion potential: Sheehan (107/30)
 Current illegal users of drugs are no longer covered by the Rehabilitation Act : Little, Lazenby (107/28)
 Firm choice given employee raising alcoholism for first time after receiving notice of proposed removal: Brock, Harris, and Brown EEOC cases (105/17)
 Conditions to meet in removing employee for physical inability to do job: Spencer (117/15)
 Disabled individual's reassignment rights limited to those parts of the agency served by the same appointing authority: Hurst (104/19)
 When the disabling mental condition involves violent behavior and unexpected outbursts the employee does not qualify as a qualified disabled individual: Battle (104/13)
 A probationary period expiring during the period of rehabilitation: Beck (103/41)
 No duty to consider accommodation absent showing that employee is a qualified handicapped employee McConnell (103/23)

Some issues related to agency's obligation to reasonably accommodate qualified disabled employees: Runyon (EEOC decision) (101/37)

Air Traffic Controller who came to work drunk is a qualified handicapped person: Anderson (101/20)

Individuals fired for misconduct, not alcoholism: Little (99/11); Rudisel (99/22)

EEOC says agency doesn't have to reassign handicapped employee to another component of the agency: McQueen (98/31)

EEOC says employee not covered by Rehabilitation Act because ADA excludes persons currently engaging in illegal use of drugs: Thomas (98/33)

Firm choice: Harris ... Banks (97/19)

Mental illness, outbursts: not "qualified handicapped persons": Mazzarella, Flanagan (95/14)

Burden of proof in handicap discrimination claims: Vernon, Mitchell (93/31)

Security clearance determinations not reviewable by MSPB or courts: *Guillot v. Navy* (93/16)

Determining proper "agency" for reassignment right purposes: Brown (92/26), McQueen (92/29)

Undue hardship exception to using RIF procedures in awarding positions to incapacitated employees: (91/38)

Agency must prod employee into treatment: *Gallaher v. Catto* (90/14)

Offenses disqualifying an employee for accommodation: Thompson (89/36)

Arbitrator can't waive employee's due process rights: Coleman (89/26)

Failure-to-object waiver re suggested accommodation: Adams (89/24)

Worker's comp eligibility and light duty reassignment: McClain (88/25)

Removing employee in rehabilitation program without further accommodation: Johnson (88/37)

Leniency not a reasonable accommodation absent firm choice: Vaughn (88/37)

Reassigning a qualified handicapped employee: Green, Joyner (86/39)

"Firm choice" between treatment and removal: Calton (82/48)

Removal while employee undergoing rehabilitation: Faber (77/34)

Reasonable suspicion of alcohol or drug abuse: Terry (76/24)

TAPER appointment: Johnston (75/17)

Allowing employees a chance to rehabilitate: Hodge (75/21)

AIDS: Ritter (74/47)

Alcohol and drug abuse: McCaffrey (74/33) ... Brinkley (74/33) ... Campbell (74/33) ... Toone (74/33) ... Loveland (74/33) ... Hougens (74/33)

Consideration of reassignment: Ignacio (Special Panel #1) (55/17) ... Lynch (Special Panel #2) (60/27) ... Rosiak (60/30) ... Ellis (73/35)

Part-time employee to full-time position: Patrick (73/24)

Where subsequently retiree on disability: Twine (72/25)

Promotion to higher grade: Clopton (72/27)

Establishment of framework to review claims of prohibited discrimination: Savage (71/29) ... Robinson (71/29) ... Clark (71/29)

Rehabilitation Act requirements override § 7106 rights: 24 F 19 (61/5)

Reassignment as an accommodation: *Carter v. Tisch* (68/8) ... Faulk (64/37)

Withdrawal of reasonable accommodation: Watson (64/38)

Qualified handicapped employee: Robertson (56/29) ... Kulling (56/31) ... Rosiak (60/30) ... Lehman and Hatcher (57/30)

Extent of agency obligation: Lynch (Special Panel #2) (60/27) ... Brunda (54/35)

Disciplinary action after rehabilitation: Tactay (60/37)

Safety considerations: Kulling (56/31)

Agency obligation when no knowledge of handicap: Ferguson (52/23)

Failure to successfully rehabilitate: Burchell (52/21)

Restructuring of job: Mallard (48/32)

Action held in abeyance: Rhodes (48/28)

Discrimination raised in reply to proposed action: Noe (48/26)

Position description as statement of essential job functions: *Guinn v. Bolger* (46/9)

Effect of misconduct: Miller (44/30) ... Nealen (44/28)

Alcoholic in sensitive position: Peru (39/22)

On-the-job intoxication: safety considerations: Cavallaro (38/24)

Light duty: Snipes (35/10)

REASSIGNMENT

Unified penalty: Welch (74/59)
 Involuntary demotion in lieu of termination: Gaudette & Cinquegrana (63/25) ... *Gaudette & Cinquegrana v. DOT* (73/17)
 As accommodation: *Carter v. Tisch* (68/8) ... Faulk (64/37) ... Patrick (73/24) ... Clopton (72/27)
 Consideration of reassignment as reasonable accommodation: Ignacio (Special Panel #1) (55/17) ... Lynch (Special Panel #2) (60/27) ... Rosiak (60/30)
 Compliance with MSPB enforcement: Mann (54/29)
 Failure to report for directed assignment: Rodriguez (46/35)
 Failure to accept: Nalbandian (45/31)

REDUCTION IN FORCE. Also see **APPROPRIATE ARRANGEMENT**, MGB Nos. 13, 22, 25 and 28.

The agency did not err in conducting the RIF based on the current structure of the organization. Unless explicitly stated in the order, the Board does not require an agency to run a RIF retroactively: Manescalchi (119/12)
 MSPB has no jurisdiction where appellant voluntarily accepts lower-graded position after receiving notification of a RIF separation but before the effective date of the action: Owen (118/18)
 Effect of midcontract changes in agency regulations on RIF rights where the CBA provides that the parties are governed by "subsequently published agency regulations and policies": 52 F 128 (118/15)
 Computing representative rates in RIF: Dube (117/18)
 Reclassification resulting from an erosion of duties, rather than from a planned reorganization, is not subject to RIF procedures: Hardy (108/13)
 Competitive area proposal that included nonunit employees: 44 F 3 (90/20) ... reluctantly enforced in *NOAA v. FLRA* (100/4) ... reconsidered and abandoned in 51 FLRA No. 42 (110/3) ... enforced by D.C. Circuit in *AFGE Local 32 v. FLRA* (118/6)
 Dividing line between non-appealable actions in lieu of RIF and actions, voluntary or otherwise, which confer RIF appeal rights: Smitka (107/24)
 A reduction-in-force may be a personnel action covered by the Whistleblower Protection Act : Carter (104/30)
 MSPB has no jurisdiction to hear RIF appeal of non-preference eligible employee: Marcoux (104/15)
 Competitive area proposal that includes nonunit employees is negotiable: 44 F 3 (90/20), reluctantly enforced in *Commerce v. FLRA* (100/4)
 Due process amendments, retirement, RIF separations, reduction in grade: Jesko (90/24)
 Resulting from reorganization: Shillinger (85/25)
 Because of an I&I ULP, FLRA orders the activity to rescind a reorganization and RIF affecting 47 employees and concludes a *status quo ante* remedy won't be disruptive: 38 F 60 (83/9)
 Disparate treatment: Stern (83/25)
 Competitive area: 3-CA-2362 (22/14) ... 8 F 46 (25/6) ... 9 F 81 (28/7) ... 11 F 53-56 (30/11) ... 14 F 98 & 99 (37/9), remanded in *AFGE v. FLRA* (51/14), reaffirmed in 22 F 49 (58/25) ... 16 F 18 (42/8), remanded in *NFFE v. FLRA* (51/14) ... reversed in 33 F 41 (74/22), affirmed in *OPM v. FLRA* and *NRC v. FLRA* (81/3)
 Bump & retreat rights for excepted service employees: *NRC v. FLRA* (80/11) ... *MSPB v. FLRA* (82/6)
 Preference eligible: Burrough (81/30)
 Nationwide freeze excessively interferes with mgmt rights: *NRC v. FLRA* (80/11)
 Lack of work: *Horner v. Schuck et al.* and *Horner v. James et al.* (74/14)
 When to use RIF or adverse action procedures: Clerman (70/35) ... Dolan (70/35) ... Dowell (70/35)
 Personal animus: Neilson (65/19)
 Consideration of employee's ability in deciding on positions to be cut: *Gandola et al. v. FTC* (53/17)
 Validity of reorganization: *Cobb v. Labor* (52/8)
 Job retention preference for union officials: 19 F 1 17 (51/26)
 Reassignment to temporary position: *Starling v. HUD* (49/7)
 Notice misinformation leading to involuntary retirement: *Covington v. Navy* (46/5)
 Filling vacancies during RIF: 20 F 85 (52/18) ... 21 F 4 (54/11) ... *Wilburn v. DOT* (46/14)
 Performance ratings affecting retention standings: Haataja and Mazzola (46/28)
 Freeze on outside hiring during realignment: 3 F 97 (9/5) ... *Assoc of Civ Techs v. FLRA* (45/3)
 SES RIF/OPM placement: Kirk (43/30)
 Term employees: Perlman (43/31)
 Transfer of function: Neilson (43/29)
 RIF assignment rights: 2 F 77 (4/5) ... Ericksen (38/13) ... 16 F 18 (42/8)

Management discretion: *Sinha* (41/14)
 Competitive levels: *Gilbert* (38/14) ... *Tucker* (41/18) ... *Young* (41/19) ... *Coleman* (41/19)
 RIF notice as evidence: *Rosen* (41/15)
 Proper classification before RIF: *Apodaca v. Education* (37/20)
 No demonstrated need for stays of grieved RIFs: 8 3 FSIP 103, R. 223 (36/9)
 Effect of IPA assignment: *Edlin* (35/11)
 Retraining programs for employees adversely affected by RIF: 8 F 35 (25/4)
 Adequacy of notice: 1 F 116 (1/15)

REDUCTION IN HOURS

Reduction in part-timer's hours can't be appealed to MSPB: *Wood v. MSPB & USPS* (87/8).

REEMPLOYMENT RIGHTS

Light duty employment not counted for restoration rights purposes: *Denny* (86/35)
 Workers compensation benefits after removal: *Brown-Cummings* (78/24)
 Timeliness of appeal: *Shiflett v. USPS* (71/13)
 Workers compensation: *Cox* (71/47)
 Restoration after disability: *Johnson v. MSPB* (64/8)
 Partially recovered employees: *Withers* (49/30)
 Priority consideration: *Phillips* (43/18)
 Temporary position: *Banaszek* (41/16)

REHABILITATION

Current illegal users of drugs are no longer covered by the Rehabilitation Act : *Little, Lazenby* (107/28)
 Backpay if placed in nonduty, nonpay status after rehabilitation: *Holly* (85/27)
 Rehabilitation Act requirements override management rights: 24 F 19 (61/5)
 Action held in abeyance: *Walton* (45/17) ... *Rhodes* (48/28)
 Stay of agency action during rehabilitation: *McGilberry* (39/24)

REMEDIES. Also see BACK PAY ACT

When interim relief is ordered, agency's failure to timely pay appellant cannot be excused: *Moore* (124/18)
 Priority consideration entitles employee to *bona fide* consideration, but not to review of the merits of the agency's reasons for nonselection: *Smith* (123/20)
 Restitutional overtime remedy is deficient because not based on a reconstruction of what the agency would have done had it not violated the CBA's "just cause" standard: 53 F 129 (123/13)
 Arbitrators must apply the remedies of the FLSA for FLSA violations: 53 F 134 (123/10)
 Consequential damages in an IRA case: *O'Regan* (122/20)
 Mitigation when deciding official regarded the misconduct to be more serious than it was: *Shelly* (122/18)
 Extension of the certification year as a remedy for bad faith bargaining: 53 F 86 (122/12)
 FLRA reimbursement order set aside because no waiver of sovereign immunity for money damages: *Army v. FLRA* (108/3) ... FLRA will no longer follow earlier cases that awarded money damages that did not constitute pay, allowances, or differentials: 52 F 11 (115/8) ... Reimbursement of the grievant's personal medical expenses barred by sovereign immunity as such expenses do not constitute pay, allowances, or differentials within the meaning of the Back Pay Act: 52 F 4 (115/9)
 When status quo ante remedy for an I&I ULP would be inconsistent with public safety: *PASS v. FLRA* (107/4)
 Interim relief when no unduly disruptive determination: *Delaughter v. USPS* (100/5)
 Remedies for contracting out violations: 22 F 72; 23 F 22, 23, 26 (58/18) ... modified to permit arbitrators to terminate contracts and convert activity to in-house performance: 43 F 64 (89/19)
 FLRA orders monetary remedy that isn't based on Back Pay Act: 41 F 76 & 77 (87/12)
 Because of an I&I ULP, FLRA orders the rescission of a reorganization and RIF involving 47 employees and concludes a *status quo ante* remedy won't be disruptive: 38 F 60 (83/9)
Status quo ante and backpay for I&I bargaining violations: 8 F 111 (26/12) ... *AFGE v. FLRA* (55/5) ... *MEBA v. FLRA* (62/6)
 Remedies for performance appraisal violations: 21 F 86 (57/19)

REMOVE EMPLOYEES. See **DISCIPLINE EMPLOYEES**

REORGANIZATION. See **ORGANIZATION OF AGENCY** and **REDUCTION IN FORCE**

REPRESENTATION. Also see **UNIT DETERMINATIONS, FORMAL DISCUSSIONS, Weingarten RIGHTS, NEGOTIATED GRIEVANCE PROCEDURE** and MGB No. 30.

"[U]nder the plain wording of section 7114(a)(2)(A), a union has a right to be represented at formal discussions without regard to the Privacy Act[.]" 53 F 73 (121/13)

Communications with union representative are privileged: 38 F 103 (84/13)

Choice of forum, union representative: Stone (74/53)

Reliance on counsel: *Weston v. HUD* (34/9) ... *Massingale v. MSPB* (39/8)

Negotiated agreement right to union representative: *Miguel v. Army* (34/11)

REPRESENTATION PROCEEDINGS--5 CFR 2422 Also see MGB No. 12.

Supervisory and/or confidential employee team leaders excluded from the unit: (118/16)

FLRA's *per se* rule is replaced with a "totality of circumstances" approach in cases where an agency grants a rival union without equivalent status access to agency premises: 52 F 114 (118/9)

Contract bar is operative if petition is filed on the same day as contract is executed: 51 F 76 (112/9)

Contract bar for agreement that automatically renews itself: 47 F 89 (98/21)

QCR raised after FSIP assumes jurisdiction: policy request denied: 46 F 129 (96/14)

No revocation of cert despite determination unit no longer appropriate: 45 F 25 (92/13)

5-paragraph MOU renewing substantive agreement is a contract bar: 44 F 20 (90/18)

When union acquires equivalent status: 44 F 36 (90/16)

Carve-outs when existing units remain appropriate: 16 F 57 (42/4)

Maintaining *status quo* while a QCR is pending and management rights: *Justice v. FLRA* (36/3)

RESIGNATION

Agency must show valid reason for denying withdrawal of resignation: Wisdom (104/16)

When resignation becomes effective: Heinze (85/22)

Voluntariness of action: *Burgess v. MSPB* (46/3) ... *Schultz v. Navy* (63/8) ... Charnock (74/49)

Attempt to withdraw: Pronechen (45/25)

RESTORATION RIGHTS

Offering employee returning from active military service a position closely approximating seniority, status and pay to which employee would otherwise be entitled: Heidel (105/23)

Restoration to duty of employee who partially recovers from a compensable injury: Scott (103/39)

Restoration to duty of a returning veteran: *Nichols v. DVA* (103/15)

Reinstatement grade affected by promotion while employee receiving compensation for work related injury: Schiflett (89/38)

Partial recovery and priority consideration for restoration: Farrell (88/14)

Discontinuing AUO not a denial of restoration rights: Smit (88/16)

RETALIATION

Intentional false statements aren't protected: Johnson (86/37)

IRA is independent of EEO complaint: Horton (85/18)

Reprisal for filing grievance isn't grounds for IRA: Fisher (85/15)

Failure to provide opportunity to respond to allegation: Holm (76/29)

Alleged reprisal: *Berube v. GSA* (74/16)

When adverse action constitutes retaliation for whistleblowing: *Warren v. Army* (64/11)

Lack of evidence of retaliatory motive: *Harvy v. MSPB* (60/9) ... *Starrett v. Special Counsel* (60/14)

Relationship of discipline to protected activity: *Stewart v. INS* (51/21)

RETIREMENT

MSPB retains jurisdiction over a removal appeal, regardless of the effective date of the appellant's retirement:

Cooper v. Navy (118/8)

Conditions for awarding attorney fees in a retirement appeals case. *Stewart* (114/14)

No good cause for waiver of filing deadline: *Mays; Tipsword* (106/21)

Removal action challenged by employee who retired before removal became effective: *Mays v. DOT* (104/7)

Appealing a pre-retirement removal action: *Drumheller, Coltin* (95/20)

Due process amendments don't cover employee retiring in advance of reduction in grade: *Jesko* (90/24)

No reinstatement of retiree when demotion mitigated to suspension: *Ballentine* (77/32)

Challenge to merits of involuntary retirement: *Barthel* (74/40)

Retirement and 1977 Panama Canal Treaty: 18 F 43 (47/23)

Mandatory retirement: *Ryan* (47/33)

Voluntariness of retirement: *Covington v. Navy* (46/15)

Involuntary discipline vs. discontinued service retirement: *Lichtman* (46/31)

Withdrawal of retirement application: *Einstein* (46/33)

Incorrect information by OPM: *Keefe* (41/12)

Annuity elections: *Cheeseman* (38/15)

Status pending disability retirement application: *Thomas* (37/17)

Disability retirement

When the agency must file and prosecute a disability retirement. *Harris v. DVA* (125/3) Separating employee for disablement creates presumption of disability: *Bruner v. OPM* (99/15)

Removing employee from rolls based on OPM approval of application: *Mavronikolas* (90/36)

Nature of action - removal or disability: *Twine* (72/25)

Loss of disability retirement benefits: *Johnson v. MSPB* (64/8)

Differing standards of proof for adverse actions and disability retirement: *Moody v. U.S.* (60/12)

Acceptance of lower-graded job: *Brantner* (60/35)

Agency-filed application: *Lizut* (55/24)

Alcoholic employee: *Winslett* (55/21)

Effect of disability retirement application on adverse action case: *Ward* (49/26) ... *Lizut* (55/24)

SAFETY & HEALTH. Also see **REASONABLE ACCOMMODATION** and MGB No. 27.

There's no compelling need for regulations barring smoking: *HHS v. FLRA* (83/3)

Medical restrictions imposed by non-agency medical authorities as a limitation on the right to assign work is a negotiable appropriate arrangement: 36 F 81 (82/30)

Smoking: *HHS v. FLRA* (79/8) ... *HHS v. FLRA* (83/3)

Aids testing at a mental retardation agency: *Glover, et al. v. Eastern Nebraska Community Office of Retardation, et al.* (78/16)

Imminent danger and refusal to work: 25 F 9 (63/23)

Safety committees: 4 F 100 (13/3) ... 11 F 63 ... 19 F 50 ... 21 F 83

Smoking area designation: *IRS, L.A. v. FLRA*, 902 F.2d 998 (D.C. Cir. 1990) (NR)

SCOPE OF BARGAINING. See **CONDITION OF EMPLOYMENT, GOVERNMENTWIDE REGULATION, COMPELLING NEED, MANAGEMENT RIGHTS**, and MGB No. 36.

SEASONAL EMPLOYEES

Layoffs: *Schmidt* (34/15) ... *NTEU v. MSPB* (43/10)

SECTION 704 EMPLOYEES

§ 704 preserves inclusion of supervisors in "mixed units" only as permissive subject of bargaining: *Interior v. FLRA* (103/8)

Sunday premium pay not a prevailing industry practice: *AFGE 1978 v. FLRA* (91/18)

Matters that are negotiable under the FSLMRS are also negotiable for employees entitled to section 704 grandfather bargaining: 41 F 1 (86/11)

§ 704 doesn't preserve units mixing supervisors with nonsupervisors: *Energy v. FLRA* (77/3)

Sunday premium pay proposal violates section 704: *Interior v. FLRA* (82/8)

No ULP in terminating Sunday premium pay: 36 F 1 (81/14)

Distinguish between § 704(a) conditions of employment and § 704(b) pay practices: *USIA v. FLRA* (80/8)
 § 704 of the CSRA doesn't preserve mixed bargaining units: *Energy v. FLRA* (77/3)
 Saved pay not a previous subject of bargaining: *Interior v. FLRA* (76/10)
 Just because a particular kind of pay was a previous subject of bargaining doesn't mean that § 704 preserves bargaining on all kinds of pay: *Interior v. FLRA* (76/10)
 Work jurisdiction: FLRA reaffirms holding in 37 F 113 after court remand: 49 F 119 (NR)

SECURITY CLEARANCES

Must give general reason for placing employee on enforced leave pending security clearance decision: *King v. Alston and MSPB* (114/3).
 MSPB limited to determining whether due process was afforded when removal is based on loss of security clearance: *Drumheller v. Army* (107/6)
 Due process requirements when indefinite suspension is based on temporary loss of security access: *Kriner, Alston* (104/35)
 MSPB can't consider whistleblower reprisal allegations if the acts involve security clearance issues. *Wilson* (104/17)
 Justified pending final decision to restore or revoke security clearances: *Jones & McDaniel v. Navy* (95/7)
 Security clearance determinations not reviewable by MSPB or courts: *Guillot v. Navy* (93/16)
 No minimal due process needed to suspend access to classified materials: *Alston* (98/23)
 Detailing employee with temporarily suspended access to classified info to a nonsensitive position: *Hill* (87/34)
 Discrimination due to security clearance denial: *Pangarova* (81/31)
 Security clearance denied or revoked: *Griffin v. DMA* (77/22) ... *Skees v. Navy* (77/22) ... *Lyles v. Army* (77/22)
 Authority to review: *Van Duzer* (74/43)
 Denial: *Egan* (48/20) ... *Navy v. Egan* (70/3)

SELECTIONS FOR APPOINTMENTS--§ 7106(a)(2)(C). Also see HIRE and VACANCIES.

An arbitral remedy that interferes with the right to select cannot be sustained where the violated CBA provision does not deal with a § 7106(b) matter: 54 F 7 (124/16)
 Although proposals **limiting** an agency's selection options interfere with the right to select, proposals **expanding** the applicant pool do not: 54 F 22 (124/14)
 Priority consideration entitles employee to *bona fide* consideration, but not to review of the merits of the agency's reasons for nonselection: *Smith* (123/20)
 Requiring agency to place employee, whose tour is involuntarily extended, in one of three positions excessively interferes with rights to assign employees and to select: 51 F 108, #6 (113/8)
 Provision restricting sources from which selections are made violates right to select: 51 F 108, #2 (113/8)
 Sequential consideration: preference for unit applicants: 24 F 54 (62/19) ... *Treasury v. FLRA* (70/10) ... *ATF v. FLRA* (74/10) ... 38 F 117 and 40 F 38, #6 (puts pressure on mgmt) (84/11 and 85/7)
 Abrogation test and selecting minimally-qualified candidate with priority consideration: 37 F 67 (82/15)
 Restating right in Governmentwide regulations: 29 F 40 (68/12) ... affirmed in *OPM v. FLRA* (75/7).
 Ultimate right to make selections directly from any appropriate source: 6 F 96 (Reconsideration Request) (24/12)
 Details and loans are not appointments: 7 F 45 (22/5)
 Restricting area of consideration: 3 F 9 (6/7) ... 3 F 13 (6/7)

SENIORITY. Also see ASSIGN EMPLOYEES and ASSIGN WORK

Seniority NN where it prevents assignment to duties where quals are more in need: 48 F 47 (99/17)
 Seniority OK if applicable to equally qualified employees (as far as the rights to assign employees and work are concerned)--20 F 105 (53/20), but not OK as far as the right to select is concerned: 35 F 127 (81/16).
 Work locations: *AFGE 1336 v. FLRA* (affirming 21 F 92) (70/13)
 Shifts: 16 F 144 (44/11)
 "Loans" selection criteria: 7 F 45 (22/6)
 Details and loans: 2 F 77 (4/5) affirmed in *Dix-McGuire v. FLRA* and *AFLC v. FLRA* (18/3) ... 7 F 45 (22/5)
 Duty stations: affirmed in *Dix-McGuire v. FLRA* and *AFLC v. FLRA* (18/3)

Assigning supervisory duties: 2 F 77 (4/5) affirmed in *Dix-McGuire v. FLRA* and *AFLC v. FLRA* (18/3)
 Involuntary reassignments to duty posts: 6 F 97 (19/11)
 TDY assignments: 5 F 15 (14/3)
 Reassignments: 3 F 44 (7/9)
 Repromotions: 3 F 26 (6/15)

SEPARATIONS. Also see **DISCIPLINE.**

Requiring an exception to the minimum service requirements of 5 USC § 5722 for *all* involuntary separations violates § 5722: 51 F 108, #5 (113/8)
 Separations of probationary employees: 4 F 50 (11/5) ... 4 F 51 (11/9) ... 80 FSIP 38 (13/7) ... 8 F 75 (25/8), reversed in *INS v. FLRA* (31/12) ... 25 F 90 (63/14)
 Separations and negotiated grievance procedure: 4 F 50 (11/5) ... 4 F 51 (11/9) 80 FSIP 38 (13/7) ... 8 F 75 (25/8), rejected by court in *INS v. FLRA* (31/2), FLRA reversal of prior decisions in 13 F 109 (34/6)

SES APPOINTEES

Actions against SES employee don't necessarily require a showing of intent: *Baracker v. Interior* (113/14)
 Performance related actions under Chapter 75: *Berube* (57/9) ... *Berube v. GSA* (74/16)
 Credibility determinations: *Hillen* (70/31)
 Violating agency standards of conduct: *Horner & Williams v. MSPB & Wieseman* (66/8)
 Special Counsel action: *Harvey v. MSPB* (60/9) ... *Starrett v. Special Counsel* (60/14)
 Removal by MSPB: *Harvey* (44/14)
 Reduction in force: *Kirk* (43/30) ... *Facer* (44/21) ... *Oxley* (44/23)

SETTLEMENT AGREEMENT. Also see **LAST CHANCE AGREEMENT.**

Union's vice president had authority to enter into a settlement agreement involving asbestos exposure: 52 F 138 (118/13)
 Settlement agreements enforceable by Board: *Stewart* (117/17)
 Waving right to grade and pay retention in a settlement agreement: *Gutierrez* (107/31)
 Settlement agreement not voided by a written information release statement: *Del Balzo* (103/37)
 Back Pay Act a limitation on settlement agreements: *Stipp* (103/21)
 Alleging a breach of a settlement agreement is an "appealable action" and may be a "mixed case." *Reid* (102/25)
 Settlement agreements not enforceable under the *Little Tucker Act*: *Bobula v. Justice* (93/18)
 When the settlement itself can be treated as the employee's resignation: *Bales* (92/19)
 The agency, not MSPB, is the proper respondent in MSPB appeals: *Amin v. MSPB, Agriculture & Lavender v. MSPB & USPS* (90/11)
 No MSPB juris re settlement agreements to which MSPB not a party: *Castro and Collier* (90/37)
 Lesser penalty and disparate treatment: *Dick* (90/29)
 Bias/coercion models applied to settlement agreements: *Lee* (86/28)
 Attorney fees: *Wesselhoft* (84/23)
 Waiver of appeal rights under last chance settlement agreement: *McCall v. USPS* (71/15). But see 38 F 34 (83/15) and *Royal* (83/17).
 Agreement to resign in exchange for agency administrative action: *Wobschall* (81/23)
 Settlement divests Board of jurisdiction: *Gosa* (80/21)
 Physical examinations: *Grube* (80/22)
 Agency breached settlement agreement: *Miller* (80/24)
 Employee's failure to resign: *McClain* (77/30)
 Board jurisdiction to accept into record: *Shaw* (75/15)
 Last chance agreements: *Gonzales* (74/45)
 Invalid settlement agreement: *Smith* (73/26)
 Waiver of appeal rights: *McCall v. USPS* (71/15)
 Fitness for duty based in settlement agreement: *Ramirez* (71/42)
 Expungement of records: *Rose* (65/15)
 Oral settlement agreement: *Young* (63/24)
 EEO settlement agreement giving rise to I&I bargaining: 23 F 6 (59/19)
 Consideration for future vacancies: *Myers* (54/27)
 Extent of agency obligations in settlement agreement: *Myers* (54/27)

Waiver, in settlement agreement, of right to grieve: 20 F 88 (52/13)

Back pay: Cortez (49/32)

Settlement agreement: Cortez (49/32)

SEXUAL HARASSMENT

Analysis of sexual harassment charge: consider the alleged misconduct from the victim's perspective and examine cumulative effect of the misconduct: Payne (119/15)

An agency is always liable for supervisory *quid pro quo* sexual harassment: *Nichols v. Frank* (106/8)

Court disagrees with MSPB and finds agency didn't prove violation of agency regulations: *Holland v. Air Force* (105/15)

Victim of sexual harassment needn't prove psychological damage or work performance decline: *King v. Hillen* (102/6)

Supreme Court on "hostile environment": *Theresa Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367, Nov. 9, 1993 (101/6)

Organic personality syndrome as an excuse for self-exposure not a mitigating factor: Walker (101/30)

Sexual harassment provision is nonnegotiable because it deals with a matter specifically provided for by 42

U.S.C. § 2000e-16(c): *INS v. FLRA* (99/9)

Agency policy, not Title VII "hostile environment," basis of sexual misconduct charges: Kirk (99/24); Alsedek (99/29)

Removal for violent response to sexual harassment mitigated to 180-day suspension: Colon (99/31)

Recommending counseling as a first resort: *Intlekofer v. Turnage* (94/9)

Standard of proof: severity, repetition, degree of impact: Hillen (88/31), (92/23)

Intimidating and offensive work environment: *Carosella v. USPS* (71/17)

Credibility; burden of proof: Hillen (70/31)

Claims under 42 U.S.C. § 2000e-2(a)(1): Vakiii (70/33)

Proving sexual harassment: *Downes v. FAA* (51/5) ... George (52/24)

Sexual harassment as discrimination: Russell (50/24)

SHIFT ASSIGNMENTS

Work locations: *AFGE 1336 v. FLRA* (70/15), affirming 21 F 92

Shift changes or overtime to attend grievance adjustment meetings: 40 F 38, #1 (85/7)

Shift swaps and qualifications for strip searches: 17 F 17 (45/10)

Service computation dates in determining shift assignments: 16 F 144 (44/11)

Shift swaps and qualifications for strip searches: 17 F 17 (45/10)

SHUTDOWN. See LEAVE and COMPELLING NEED

SOVEREIGN IMMUNITY. See REMEDIES.

SPECIAL COUNSEL (SC)

Special Counsel proceedings subject to Whistleblower Act provision: Special Counsel v. Marple (87/20)

Special Counsel action: *Harvey v. MSPB* (60/9) ... *Starrett v. Special Counsel* (60/14)

Special Counsel's authority to investigate: Russell (50/24)

Special Counsel complaint: assessment of penalty by Board: Hoban (42/29) ... Harvey (44/14) ... Filiberti and Dysthe (44/17)

STAFFING PATTERNS--§ 7106(b)(1). Also see METHODS AND MEANS

Helicopters and their pilots deal with staffing patterns and methods and means. 54 F 69 (125/10)

FLRA, finding that § 2(d) of EO 12871 (Order) does not constitute an election to bargain over § 7106(b)(1)

subjects, said that "[q]uestions concerning the Respondent's compliance with the [Order] . . . are properly resolved as a matter involving the internal management of the Executive branch." 54 F 43 (124/10)

Record not adequate to determine whether the President's directive to bargain on (b)(1) matters can be enforced through FLRA's ULP and subsequent court proceedings: 53 F 70 (121/5)

A "hiring" proposal held to deal with staffing patterns. It, and proposals dealing with use of temporaries and assignment of dental hygienists, NG at election of agency. The duties of a position constitute a "work project" within the meaning of (b)(1) and "staffing patterns" refers to allocation of existing staff: 52 F 106 (117/5)

"Dominant requirement" approach to proposals with nonseverable (a) and (b)(1) requirements ... establishing an

organizational subdivision in order to prescribe its staffing is NN: 52 F 78 (116/7)
 Proposal aimed at affecting the duration and order of TDY assignments during any one fiscal year does not concern a § 7106(b)(1) matter 54 F 123 (114/5)
 General Counsel asks FLRA for a ruling on the relationship between (b)(1) and (a): (106/18)
 General Counsel will issue ULP complaints for refusing to bargain on (b)(1) matters: (106/17)
 Court says 7106(b)(1) is an exception to 7106(a): *Montana Air v. FLRA* (102/4)
 Solitary work proposal excessively interferes with right to assign work: 49 F 38 (102/17)
 EO 12871 directing bargaining on § 7106(b)(1) matters: (99/4)
 § 7106(b)(1) proposals that also interfere with § 7106(a) rights: 48 F 15, #12 (99/19 at 20)
 Starting & quitting times a permissive subject: 33 F 73 (74/19)
 Staffing pattern waiver via past practice clause: 29 F 46 (68/15)
 Daylight savings time & overlapping shifts: *Navy v. FLRA* (64/3)
 100% official time: 19 F 23 (48/15), reversed in *AFGE 214 v. FLRA* (59/5)
 Freeze on outside hiring during realignment: 3 F 97 (9/5) ... *Assoc of Civ Technicians v. FLRA* (45/3)
 Decision to change holiday staffing ... 15 F 21 (37/3)
 Using part-timers when not practical or prudent to use full-timers: *Air Force v. FLRA* (36/2), reversing 8 F 116
 Minimum staffing levels: 8 F 35 (25/4)
 Pairing journeymen or supervisory officers with trainees: 8 F 75 (25/8)
 Solitary work: 6 F 105 (20/7)
 Prescribing qualifications of employees to be assigned to particular positions: 3 F 28 (7/5)
 Adequate number of overhires: 2 F 77 (4/15)
 Every other weekend off: 2 F 78 (4/12)
 Not a ULP to refuse to cooperate with FSIP decision imposing a 7106(b)(1) provision: 15 F 65 (NR)

STANDARDS OF EMPLOYEE CONDUCT

MSPB spells out what's required to prove conflict of interest: *Fontes* (90/32)
 Disciplinary actions against Federal managers: *Horner & Williams v. MSPB & Wieseman* (66/8)
 Conflict of interest: disclosure: *Connett* (63/22)
 Special Counsel's authority to investigate violations: *Russell* (50/24)
 Notifying local unions of agencywide modifications of standards of conduct: 12 F 86 (32/5)
 Extent to which employee standards of conduct are negotiable: 6 F 98 (19/15)

STANDARDS OF UNION CONDUCT

FLRA finds no reasonable cause to rebut the presumption that a union is free from corrupt/antidemocratic influences: 53 F 85 (122/10)
 Assistant Secretary [of Labor for Employment Standards] jurisdiction: 5 F 5 (13/5)

STANDBY

Employees stranded overnight not on standby: 9 F 65 (28/5)

STATEMENTS

Prohibited statements: 3 F 57 (7/15)

STAYS OF PERSONNEL ACTIONS

Whistleblowing protection: Special Counsel (84/33)
 Suspension due to protected activity: Special Counsel (82/46)
 Disciplinary actions appealed to MSPB: 9 F 70 (27/10), reversed in *NTEU v. FLRA*, 712 F.2d 669 (D.C. Cir. 1983)
 Participation in drug/alcoholism program as a stay to disciplinary action: 6 F 98 (19/15)
 Pending completion of arbitration: 2 F 16 (2/7), affirmed in *Dix-McGuire v. FLRA* and *AFLC v. FLRA* (18/3)
 Staying grieved personnel actions: 4 F 50 (11/5), affirmed in 675 F.2d 260 (11th Cir. 1982) ... 80 FSIP 38 (13/7) ... 81 FSIP 17 (16/9)

STRIKES, SLOWDOWNS, JOB ACTIONS--§ 7116(b)(7). Also see MGB No. 14.

Status of negotiating team: Fitzgerald (39/18)

Suitability of strikers: *Caruso* (39/20)
 Stopping work for 3-6 minutes to confront manager: 4 F 22 (10/5)
 PATCO decertified for calling and participating in strike: 7 F 10 (21/5), affirmed in *PATCO v. FLRA* (26/5)
 Effect of threat or intimidation: *Adams v. DOT* (37/14) ... *Johnson v. DOT* (37/15)
 Effective length: *Adams v. DOT* (37/14)
 Proof of *prima facie* case: *Shapansky v. DOT* (37/13)
 Supervisor's support of strike: *Harold Brown* (37/15)

SUITABILITY

Falsification: *Buhl* (74/15) ... *Katchmeric* (66/26) ... *Forsha* (66/26)
 Action by OPM under Part 754: *Kissner v. OPM* (60/16)
 Board's authority to order remedy: *Schaefer* (49/24)

SUPERVISORS. Also see **UNIT ELIGIBILITY DETERMINATIONS**

Circumstances under which poor judgment is particularly egregious: *Wilson* (122/22)
 3 F 66, temporarily abandoned in 49 F 102, is reaffirmed: management can elect to bargain on the working conditions of supervisors and managers: 52 F 65 (116/13)
 Proposals directly implicating the working conditions of supervisors are outside the mandatory scope of bargaining: 52 F 80 (116/11)
 3 proposals directly implicating COE of supervisors not a mandatory subject of bargaining: 52 F 80 (116/11)
 Management can elect to bargain on working conditions of sups and mgrs: 52 F 65 (116/13)
 Putting a demoted supervisor into a non-supervisory position with least loss of grade and pay: *Davis* (107/19)
 NGP & infractions committed while an acting supervisor: *Devine v. Levin* (39/6), apparently reversed in *Hess v. IRS* (79/3)
 Supervisors can vote in union elections if they are members: *AFGE v. FLRA* (69/9)
 Obeying improper supervisory orders not a basis for discipline: *Rose* (48/35)
 Immunity from suits: *Dretar v. Smith* (46/13)

SUSPENSIONS. Also see **DISCIPLINE.**

Suspension while on LWOP & receiving OWCP isn't appealable to MSPB: *Weaver* (95/18)

Constructive suspension

Availability of work no longer is relevant to MSPB's jurisdiction in constructive suspension cases: *Rivas* (103/35)
 Putting employee in non-pay, non-duty status pending change in medical restrictions: *Magno* (90/26)
 AWOL for failure to submit medical documentation not constructive suspension: *Bucci* (72/24)
 Enforced leave pending inquiry: *Passmore* (58/29)
 Enforced leave based on bizarre behavior: *Thomas V. GSA* (47/20)
 Charging incarcerated employee with AWOL: *Poe* (40/16)

Indefinite suspension

Back pay when reinstated from an indefinite suspension: *Richardson and Mosley v Customs* (107/7)
 Reasonable cause when based on an arrest warrant rather than a criminal indictment: *Barresi* (106/19)
 Arrest for murder not a basis for indefinite suspension where agency didn't investigate self-defense claim: *Ellis* (103/34)
 Justified pending final decision to restore or revoke security clearances: *Jones, McDaniel* (95/7)
 "Reasonable cause" test for shortening notice period under the crime provision: *Bell* (93/29)
 Reasonable cause established by a search warrant: *Dunnington v. Justice* (92/5)
 Indefinite suspension after disposal of criminal charges are improper: *Thompson* (89/36)
 Indefinite suspensions taken during security clearance investigation: "condition subsequent" terminations: *Jones & McDaniel* (89/22)
 Non-"crime" provision indef suspensions: *Jones, Alston, Simmons, Brown* (87/26)

Indefinite constructive suspension: Barnes (86/20)
 Indefinite suspensions not violative of Constitution: Engdahl (79/15), affirmed in *Engdahl v. Navy* (82/9)
 "Reasonable cause": Cox (39/28) ... *Wiemers v. MSPB* (57/9) ... Dunnington (82/36)
 Continuation past termination of criminal proceedings: Shaffer (71/33) ... Hernandez (71/33) ... Torres (71/33)
 Failure to notify of termination: Brode (68/29)
 Selection of penalty: Jarvis (65/22)
 Continuance during notice period: Campbell (61/29)
 Effect of acquittal: Covarrubias (43/24) ... Brown and Charest (44/5)
 Procedural error: Farris (43/26)
 Termination of agency investigation: Littlejohn (45/28)
 Based on arrest: Larson (45/29)
 Temporary nature: Tigner-Keir (39/30)

TAPER EMPLOYEES

752 coverage: Carter (35/9)

TECHNOLOGY. See **METHODS and MEANS.**

TEMPORARY EMPLOYEES

Removal of temporary employees is nongrievable: 38 F 110, #3 (84/9)
 Non-renewal of appointment as reprisal for whistleblowing: Kern (86/34)
 Removal based on performance: Meade (80/26)
 No appeal rights for series of temporary limited appointments: *Horner v. Lucas* (69/10)
 Series of temporary limited appointments: Fish (54/20)
 Crediting service for preference eligibles: Geter (35/13)

THEFT

14-day suspension for *de minimis* theft: Skates (113/17)
 Definition of "theft" applies to the taking of photocopies: Heath (105/19)
 Appellant, a former supervisor, should have known agency policy on personal use of scrap metal: Chauvin (102/34)
 Proving theft charges: Nazelrod (88/23)
 Circumstantial evidence: Davis (52/25) ... Mojica-Otero (59/32)
 Small dollar amount: *Dewitt v. Navy* (43/6) ... Williams (43/20)
De minimis: Miguel (34/11)

THREATS

Threats: Statements made while in contact with agency EAP counselor. Powell (119/20)
 Standards for determining whether threat was made: *Metz v. Treasury* (53/5)

TIMELINESS

When an appeal can't be dismissed solely on the issue of timeliness. Greek (125/15)
 Waiving filing deadline OK where "days" reasonably construed to mean working days: *Walls v. MSPB* (105/13)
 20-day period begins on effective date of action unless notice is given after effective date: *Lout v. MSPB* (104/9)
 Good cause for late filing: Sanford (103/32)
 Rebuttable presumption regarding mailings to the Board: Gaydon (103/28)
 MSPB doesn't excuse when the employee's representative should have known better: Miller (92/31) ... reversed by the Federal Circuit in *Miller v. Army* (97/9)
 Overcoming presumption that postmark date is date of filing: Lawrence (90/23)
 Filing by express company constitutes "personal delivery": Holland (89/30)

TRAINING. Also see **ASSIGN WORK** and **APPROPRIATE ARRANGEMENTS**

Duty-time instruction unrelated to job (e.g., information on drug testing program) isn't covered by right to assign work. 39 F 45 (84/7)
 Abrogation test and training for detailed employees: 37 F 47 (82/15)
 Right to training during PIP: Wright (79/18)
 Retaining flexitime while in training during duty hours: 9 F 142 (29/1)
 Training and work preservation: 8 F 35 (25/4)
 Training: its type, frequency, duration, location, scheduling: 3 F 66 (9/1) ... 6 F 106 (20/11)
 Reimbursement for continuing legal education: 6 F 97 (19/11)
 Administrative leave to attend legal education courses: 6 F 97 (19/11)
 Scheduling indoor training during winter: 3 F 76 (9/4)
 Union-sponsored training & Comp. Gen. decisions: 3 F 128 (9/13)

TRANSFERS (i.e., reassignments)

Transfer prompted by conflict of interest: 12 F 86 (32/5)
 Guidelines (i.e., "considerations") for lateral transfers: 4 F 52 (11/13)

TRAVEL & PER DIEM. Also see **OFFICIAL TIME**

Requiring, with respect to return travel, an exception to the minimum service requirements of 5 USC § 5722 for *all* involuntary separations violates § 5722: 51 F 108, #5 (113/8)
 For FLRA proceedings: *Wright-Patterson AFB v. FLRA*, *McClellan AFB v. FLRA*, and *Sacramento AFB v. FLRA* (77/11)
 For midterm bargaining: 31 F 94, #2 (71/23)
 Reimbursement for travel for employees on official time: 21 F 2 (54/14), enforced in *Treasury v. FLRA* (70/13)
 Mileage reimbursement: 14 F 84 (39/10)
 No waiver of right to travel and per diem: 10 F 40 (29/7)
 For negotiated official time under § 7131(d): 9 F 70 (27/10)
 For collective bargaining under § 7131(a): 2 F 31 (3/3) ... 672 F.2d 732 (9th Cir. 1982), affirming 4 F 40 (24/10), but reversed by Supreme Court in *BATF v. FLRA*, 104 S.Ct. 439 (33/3) ... 683 F.2d 45 (2nd Cir. 1982), reversing 7 F 69 (26/3) ... 691 F.2d 1242 (8th Cir. 1982), reversing 6 F 45 (28/3)
 Limiting travel away from normal duty station: 8 F 75 (25/8)
 T&PD for processing grievances: 80 FSIP 53 (12/3)

UNFAIR LABOR PRACTICES. Also see **FORMAL DISCUSSIONS**, **WEINGARTEN RIGHTS**, **INFORMATION**, **OFFICIAL TIME**, **STRIKES**, etc. (See **I&I BARGAINING** for I&I ULPs.)

FSIP definition of impasse not applicable in duty-to-bargain ULPs. 54 F 68 (125/13)
 FLRA, finding that § 2(d) of EO 12871 (Order) does not constitute an election to bargain over § 7106(b)(1) subjects, said that "[q]uestions concerning the Respondent's compliance with the [Order] . . . are properly resolved as a matter involving the internal management of the Executive branch." 54 F 43 (124/10)
 General Counsel decision not to issue a ULP complaint isn't judicially reviewable. *PATCO v. FLRA* (121/4)
 ULP to not bargain over a matter (here, midterm bargaining) previously found negotiable: 52 F 46 (115/3)
 FLRA adopts new approach to ULP cases involving contractual defense to alleged violations of statutory rights: 47 F 103 (98/14)
 "Differing and arguable" defense to ULP: *IRS v. FLRA* (91/6). But see 47 F 103 (98/14).
 FLRA had no ULP jurisdiction over a proposed removal once the employee grieved the removal action: *Commerce v. FLRA* (93/7)
 ULP to violate employee's CONTRACTUAL rights: 43 F 86 (89/17)
 Retroactive bargaining orders: *NTEU v. FLRA (en banc)* (82/7)
 No elements of C-need determination will be made in ULP context: 32 F 73 (72/13)
 Reopening expedited award for evidence of protected activities: 32 F 40 (72/21)
 Judicial review when statutory ULP implicated in AR decision: *NTEU v. FLRA* (66/3)
 Noncompliance with an illegal award: 27 F 91 (66/20)
 Backpay remedies for refusal-to-bargain ULPs: 27 F 36 & 71 (65/9)
 FLRA enforcement of arbitration awards: 22 F 20 (57/13). Also see **ARBITRATION**.
 ULP to bargain to impasse on permissive subject: 18 F 92 (48/14)
 Maintaining *status quo* when FSIP's services timely invoked: 18 F 61 (48/18)
 C-need determinations may not be made in ULP proceedings: *FLRA v. Army* (Sup. Ct. decision) (71/3), agreeing with 4th's review of 21 F 100 in *Army Engrs v. FLRA* (47/14), but disagreeing with the DC Cir's

review of 12 F 86 (32/5) in *DLA v. FLRA* (45/8)
 QCR *status quo* maintenance and § 7106 rights: *Justice v. FLRA* (36/3)
 Refusal to participate in arbitration proceedings: 7 F 23 (21/7), reversed by 10 F 60 (29/9)
 Negotiated precharge procedure: 8 F 81 (25/12)
 Free speech & prohibited statements: 3 F 57 (7/15) ... 6 F 32 (18/7)
 Making negotiability determinations in ULP proceedings: 4 F 100 (13/3)
 Mixed motive cases and the *Mt. Healthy* requirements: 6 F 23 (17/13) ... *AFGE Council v. FLRA*, affirming 9 F 11 (32/12). Cf. 2 F 118 (5/11)

UNIFORMS. See ATTIRE

UNIT CONSOLIDATIONS--§ 7112(d). Also see **UNIT DETERMINATIONS** and MGB No. 12.

Effect on duty to bargain at local level: 6 F 33 (18/10)
 Representative distribution of employees and units: 5 F 89 (17/5) ... 5 F 90 (17/7) ... 5 F 91 (17/8)
 Proposed consolidations of DOT units are inappropriate: 5 F 89 (17/5)
 Nationwide consolidation of 69 AAFES units is appropriate: 5 F 90 (17/7)
 Proposed consolidation of Corps of Engineers units is inappropriate: 5 F 91 (17/8)
 Appropriate unit criteria: 2 F 25 (2/13)

UNIT DETERMINATIONS (in general). Also see MGB No. 12.

Including supervisors in § 704 "mixed" units is a permissive subject of bargaining: *Interior v. FLRA* (103/8).
 When it is claimed that both successorship and accretion apply to transferred employees, FLRA will first determine whether successorship applies: 52 F 97 (117/10)
 Successorship criteria: 3 F 12 (NR) ... SUPERSEDED BY 50 F 56 (107/15)
 § 704 preserves inclusion of supervisors in "mixed units" only as permissive subject of bargaining: *Interior v. FLRA* (103/8)
 No revocation of cert despite finding that unit is no longer appropriate: 45 F 25 (92/13)
 Arbitrators can't decide unit status: 32 F 125 (73/21)
 Accretion criteria the same as those of § 7112. 47 F 53 (NR)
 Self-determination elections: 3 F 17 (6/11) ... 5 F 20 (14/5) ... 6 F 55 (19/3)
 Appropriate unit: 5 F 5 (13/5) ... 5 F 20 (14/5)
 Labor organization--§ 7103(a)(14): 5 F 5 (13/5)

UNIT ELIGIBILITY DETERMINATIONS--§ 7112(b).

Team leaders who are supervisors and/or confidential employees are excluded from the unit: (118/16)
 Schedule C employees don't have community of interest with employees in a nationwide unit: 41 F 96 (87/9)
 Supervisor--§ 7112(b)(1): 4 F 85 (12/1 1) ... 5 F 5 (13/5) ... 7 F 78 (23/5) ... 35 F 137 (81/14)
 Summary of management official determinations: (26/15)
 Supervisor (firefighter or nurse)--§ 7103(a)(10): 7 F 78 (23/5)
 Management official--§ 7112(b)(1): 4 F 83 (12/6) ... 7 F 24 (21/9)
 National security work--§ 7112(b)(6): 4 F 85 (12/11) ... 5 F 30 (14/9)
 Personnel work--§ 7112(b)(3): 4 F 83 (12/6) ... 4 F 85 (12/11) ... 5 F 30 (14/9)
 Personal service contract teachers: 3 F 57 (7/15) ... 5 F 5 (13/5)
 Confidential employees--§ 7112(b)(2): 4 F 83 (12/6) ... 4 F 85 (12/11)
 Merit pay determinations have no bearing on unit status: 4 F 99 (12/15)
 NG appeal wrong forum to determine unit eligibility: 3 F 117 (9/7)
 Internal security work--§ 7112(b)(7): 7 F 74, 141 & 15 F 161 (NR)
 Administering 5 U.S.C. § 7106 *et seq.*--§ 7112(b)(4): 3 F 19 (NR)
 Professional employees--§ 7112(b)(5): 5 F 85 ... 8 F 123 ... 9 F 101 (NR)

UPWARD MOBILITY

Announcing upward mobility positions: 2 F 33 (3/11) ... 80 FSIP 38 (13/7)

VACANCIES. Also see **PROMOTIONS**

Federal employees serving in military duty have a right to be informed of newly created vacancies and must be given the opportunity to apply for those vacancies. *Allen v. USPS* (124/7)

Sequential consideration: preference for unit applicants: 2 F 59 (4/2) ... 3 F 9 (6/5) ... 24 F 54 (62/19) ... *Treasury v. FLRA* (70/10) ... *BATF v. FLRA* (74/10) ... Putting pressure on mgmt to select from unit is NN: 38 F 117 (84/11) ... 40 F 38, #6 (35/7)

Filling vacancies during RIF: 20 F 85 (52/18) ... 21 F 4 (54/11) ... *Wilburn v. DOT* (46/14)

Selection deadlines: 14 F 84 (39/10)

Mandating selection of repromotion eligibles for vacancies and OPM regulations: 7 F 13 (on remand) (37/11)

§ 7106(a) doesn't apply to selection of repromotion eligibles: *AFGE v. FLRA* (31/5)

Right to ultimately make selections directly from any appropriate source: 6 F 96 (Reconsideration Request) (24/12)

Overriding exigency to fill position: 4-CA-856 (23/3)

Using agency's merit promotion procedures to fill all unit vacancies: 6 F 96 (20/5)

Merit promotion or seniority options for filling vacancies: 81 FSIP 17 (16/9)

Trainee positions: 80 FSIP 38 (13/7)

Freeze on outside hiring during realignment: 3 F 97 (9/5)

Area of consideration: 2 F 59 (4/2) ... 3 F 9 (6/5) ... 3 F 13 (6/7)

Repromoting FES-downgraded employees on basis of seniority: 3 F 26 (6/15)

Seniority-based assignment procedures and duty station mobility assignments: 2 F 77 (4/5)

Announcing vacancies: 2 F 33 (3/11)

Requirement to fill vacancies: 2 F 33 (3/11)

Temporary promotions to nonexistent positions: 2 F 77 (4/5)

Supervisory positions, agency regulations, scope of NGP, and grievability: compare 25 F 36 (NR) with 34 F 100 (NR)

Grieving nonselection for nonunit vacancies: 25 F 36 and 34 F 100 (NR)

VOLUNTARINESS OF ACTION

Refusing to honor request to withdraw voluntary demotion: Rivas (98/25)

Misinformation rendering voluntary action involuntary: Pazeck (89/40)

Agreement to resign in exchange for agency administrative action: Wobschall (81/23)

Employee considers a voluntary action to be involuntary: Malone (81/33) ... Schrum (81/33)

No reinstatement of retiree when demotion mitigated to suspension: Ballentine (77/32)

Challenge to merits of involuntary retirement: Barthel (74/40)

Voluntariness of action: Charnock (74/49)

Informed choice: *Covington v. Navy* (46/5) ... *Gaudette & Cinquerana* (63/25) ... *Gaudette & Cinquerana v. DOT* (73/17)

Coercion: *Schultz v. Navy* (63/8)

Nonfrivolous allegation of involuntariness before MSPB: *Burgess v. MSPB* (46/3)

Voluntariness for discontinued service retirement purposes: Lichtman (46/31)

Withdrawal of retirement request: Einstein (46/33)

WAIVER

Criteria for bargaining history waiver: 46 F 57 (94/13)

Prohibiting waiver of statutory appeal rights in last chance agreements is negotiable: 38 F 34 (83/15)

EEO appeal rights: Royal (83/17)

Waiver of appeal rights under last chance settlement agreement: *McCall v. USPS* (71/15). But see 38 F 34 (83/15) and Royal (83/17).

Unemployment compensation: Miura (78/22)

Waiver of appeal rights: Ferby and Jackson (45/14) ... *McCall v. USPS* (71/15) ... Gonzales (74/45)

Midterm bargaining zipper clauses: 31 F 109 & 111 (71/11). See also MGB No. 34.

Staffing pattern waiver via past practice clause: 29 F 46 (68/15)

Waiver, in settlement agreement, of right to grieve: 20 F 88 (52/13)

Waiver of an unknown statutory right to travel and per diem: 10 F 40 (29/7)

Waiver of right to bargain on decision by limiting bargaining request to impact bargaining: 10 F 100 (29/14)

WEINGARTEN RIGHTS--§ 7114(a)(2)(B). Also see MGB Nos. 1 and 30.

Differing circuit court views on whether Inspector General agents are "representatives of the agency" for the purposes of § 7114(a)(2)(B): *FLRA v. NASA* and *FLRA v. Justice* (120/3)
 Court questions "necessity" for information on functioning of Inspector General: *DOJ v. FLRA* (105/6)
 Contractual limitations on IG agents nonnegotiable: *NRC v. FLRA* (103/12)
 No violation where employee given choice of no interview or continuing without representation and employee elects latter: *INS v. FLRA* (87/5)
Weingarten rerun remedies: 35 F 56 (80/13)
 Representation by nonunion reps & waiver of union right to be present: 31 F 94, #7 (71/24)
Ad hoc administrative immunity & fear of discipline: *AFGE v. FLRA* (54/6)
 Advising employee of right to remain silent: 4 F 32 (10/15), reversed in *Pearl Harbor Public Works v. FLRA* (25/2)
 Postponing examination for two days: 8 F 75 (25/3)
 Written notice of right of representation: 8 F 75 (25/8)
 Representation before giving written statement: 8 F 75 (25/8)
 Secret Service criminal investigation not a *Weingarten* examination: 7-CA-876, ALJ Report No. 9 (25/15)
 No ULP because no questions or interrogation: 2-CA-536 (14/14) ... 6-CA-1193 (22/16)
 Fitness-for-duty examination: 3-CA-1858 (22/16)
 Performance evaluation not a *Weingarten* meeting: 5 F 53 (15/9)
 Discontinuing examination upon request for representation: 9-CA-492 (14/14)
 Discussing work procedure: 7-CA-614 (14/13)
 Oral notice of *Weingarten* rights: 79 FSIP 98 (7/7)
 Inspector General agent is a representative of the agency: *DCIS v. FLRA*, 855 F.2d 93 (3rd Cir. 1988) (NR) ... 35 F 84 (NR)

WHISTLEBLOWING

A progress report is not a formal performance evaluation and therefore is not a personnel action within the meaning of the Whistleblower Protection Act. *King v. HHS* (124/9)
 Rescission of formal proposal notice doesn't necessarily render moot a claim of whistleblower reprisal: *Kagel* (123/4)
 Reorganization memos and letters not protected disclosures entitling appellant to whistleblower protections. *Sazinski* (122/21)
 Whistleblower protection when disclosure is revealed by another employee in a grievance: *Loyd* (113/16)
 Preponderance of the evidence is the standard of proof agency must meet regarding its charges: *Scott* (112/11)
 The WPA doesn't apply to minor and inadvertent miscues: *Frederick v Justice* (112/3)
 A person may not participate in misconduct, blow the whistle on his or her own misconduct, and be protected from the consequences of that misconduct: *Watson v Justice* (111/3)
 Appellant's criticism directed to his fellow staff and his supervisor did not constitute protected disclosure: *Horton v. Navy & DOT* (110/2)
 Reprisal as the determinative factor in supervisor's action: *Special Counsel v. Santella*; *Frederic v. Justice*: (107/33)
 Disclosures to co-workers may be protected whistleblowing activity: *Sirgo* (107/32)
 Complaints about unsafe working conditions proper subject of IRA appeal to MSPB: *Owen* (105/25)
 IRA appeal found to be moot: *Occhipinti* (104/37)
 Whistleblower protections extend to employees who, as part of their jobs, routinely report violations of law and regulation: *Garrett* (104/21)
 MSPB can't consider whistleblower reprisal allegations if the acts involve security clearance issues. *Wilson* (104/17)
 Simultaneous filing of NGP grievance and IRA appeal: *Laity* (103/29)
 Individual right of action: resignation the result of threatened termination: *Zygmunt* (103/25)
 MSPB adopts Special Counsel's definition of "abuse of authority": *D'Elia* (102/29)
 Matters raised in a claim for on-the-job injury benefits could constitute whistleblowing. *Von Kelsch* (101/23)
 Shifting burdens under Whistleblower Act of 1989: *Marano v. Justice* (100/7)
 Analytical framework to be used in considering whistleblowing complaints: *Clark v. Army* (99/13)
 Where employee has option to file an IRA or a regular appeal to MSPB: *Massimino* (99/28)
 MSPB defines "gross waste of funds" and "gross mismanagement": *Nafus...Dean* (99/36)
 Statements to OSC proper basis for determining whether whistleblowing occurred: *Ward v. MSPB* (96/10)
 Proper standard ("significant factor") for § 2302(b)(8) violations: *Hathaway v. MSPB* (96/9)
 Where whistleblowing must be a "significant" rather than a "contributing" factor for disciplinary cases under 5 USC 1215: *Eidmann v. MSPB* (93/94)